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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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F.C.C. 73-1097

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO PROVISIONS FOR THE AMATEUR-SATELLITE SERVICE IN PART 97 OF THE RULES	Docket No. 19852

NOTICE OF INQUIRY

(Adopted October 25, 1973; Released October 30, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On February 14, 1973, the Commission adopted amendments to Part 2 of the Rules, in Docket 19547, conforming to the extent practicable with the Geneva Radio Regulations, as revised by the Space World Administrative Radio Conference, Geneva, 1971. With these amendments, a new Amateur-satellite Service was established and certain frequencies within the Amateur Radio Service were also allocated to the new service. The Commission desires to proceed with rule making for the Amateur-satellite Service.

2. The Amateur-satellite Service is defined as "A radiocommunication service using space stations on earth satellites for the same purpose as those of the amateur service." Space radiocommunication is defined as "Any radiocommunication involving the use of one or more space stations or the use of one or more passive satellites or other objects in space". A space station is defined as "A station located on an object which is beyond, is intended to go beyond, or has been beyond, the major portion of the earth's atmosphere".

3. The frequencies allocated to the Amateur-satellite Service are:

7.0–7.1 MHz	435–438 secondary status, telecommand required.
14.0–14.25	
21.0–21.45	
28.0–29.7	24–24.05 GHz
144–146 MHz	

In the frequency band 435–438 MHz, the Amateur-satellite Service may be authorized, provided harmful interference is not caused to other authorized services also operating in that frequency band.

4. Over the past twelve years, prior to the adoption of these rules, the Commission authorized a total of six amateur radio stations for operation on board earth satellites, under the rules in Part 97 applicable to all amateur radio stations. Specific temporary waivers to the rules were granted where necessary. For instance, in the case of the most recent amateur satellite OSCAR 6, launched on October 15, 1972, several waivers to specific regulations in Part 97 were granted for station operation under the license WA3NDS. These waivers were granted on the basis of representations to the Commission by the

applicant concerning certain provisions incorporated into the design of the station, including reasonably well protected remote control command functions and very low transmitter power.

5. Unlike its predecessors whose operating lifetimes were but a few weeks, OSCAR 6 was designed for an operating lifetime of at least one year. This demonstrated that amateurs now have the capability of producing satellites to operate for periods exceeding the six month limitation for waivers authorized by the Bureau Chief under delegated authority. For this reason, on March 21, 1973, the Commission adopted an order delegating to the Chief, Safety and Special Radio Services Bureau authority to act on waiver requests of the provisions of Part 97 for amateur radio stations on board satellites. Waivers granted under this delegated authority are limited to rules regarding station location, authorized emissions, station control, identification, logging and operator privileges. This action was taken as a temporary measure pending the development of rules for the Amateur-satellite Service to govern the operation of amateur satellites.

6. It is our objective that the Amateur-satellite Service develop in an orderly fashion and in a spirit of cooperation with other amateur radio activities and services sharing the same frequencies. While we recognize that every eventuality and need cannot be accounted for now, and that further rule making will be necessary, we believe there is sufficient basis for establishing rules. The experience of amateurs with six satellites over a twelve year period should provide adequate insight for developing rules. Accordingly, the Commission will establish rules for the Amateur-satellite Service in Part 97. We propose to adopt a new Subpart, Amateur-satellite Service, based upon information provided in response to paragraphs 7 and 8 of this Notice, and such other relevant information as deemed appropriate.

7. In order to assist the Commission in formulating rules for the Amateur-satellite Service, knowledgeable parties are invited to submit comments and suggestions on the following:

a. What specific types of stations and/or functions should be provided for in the Amateur-satellite Service, in addition to space stations? Earth stations? Telecommand stations? Others?

b. What should be the station license requirements and privileges for the above stations? What representations should be made for these stations in applications for licensing?

c. What classes of amateur radio operator licenses should be a prerequisite for the above station licenses? What should be the operating privileges at these stations? What material should be added to the examinations for these operator classes?

d. What technical standards should be adopted? What should the telecommand and telemetry requirements be? What emissions should be authorized?

e. What should the rules provide for in the way of operating requirements and procedures? Station identification requirements? Station log requirements? should distinctive call signs be assigned?

f. What other provisions should be included in the rules?

8. Comments and suggestions on the means by which the Commission can fully and properly comply with the requirements of international agreements are solicited. Geneva footnote 320A to the Table in Section 2.106 requires the Commission to ensure that any harmful interference caused by emissions from an amateur satellite authorized by the Commission to operate in the band 435–438 MHz be eliminated

by means of appropriate devices for controlling the emissions. Additionally, the Commission must insure that sufficient earth command stations are established before launch to guarantee that harmful interference can be terminated by the Commission, as stipulated by Article 41, Section 1576A, Subsection 6 of the ITU Radio Regulations.

9. This action is taken pursuant to Sections 4(i), 303, and 403 of the Communications Act of 1934, as amended. Comments must be filed on or before January 7, 1974. All relevant and timely comments will be considered.

10. In accordance with provisions of Section 1.419 of the Rules, an original and fourteen (14) copies of all comments, suggestions, pleadings, briefs, or other documents shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1128

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART O OF THE COMMISSION'S RULES—COMMISSION ORGANIZATION—WITH RESPECT TO DELEGATIONS OF AUTHORITY TO THE CHIEF, BROADCAST BUREAU

ORDER

(Adopted October 31, 1973; Released November 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. The Commission has completed its review of the delegations of authority to the Chief, Broadcast Bureau, and has concluded that in addition to the need for up-dating, the public interest would be served by eliminating the lengthy recitation of specific delegations of authority presently appearing in section 0.281 of the rules, and in lieu thereof to restructure that section in terms of those matters to be referred to the Commission *en banc*. As so amended, the residue of undefined matters will be disposed of at staff level in accordance with established policy and precedent unless, in the opinion of the staff, a particular matter warrants referral to the Commission.

2. Despite the extensive nature of the changes herein ordered, the internal handling of petitions for reconsideration and applications for review will not vary substantially from past practice. Specifically, petitions for reconsideration filed under section 405 of the Communications Act will continue to be acted on by the Commission *en banc* or by the "designated authority" within the Commission, depending upon the circumstances of the case, whereas all properly filed applications for review will, in accordance with section 5(d) of the Communications Act, continue to be referred to the Commission *en banc*. Persons aggrieved by actions taken at any level within the Commission are thus assured that their right of access to the full Commission is in no way affected by the ordered changes.

3. The restatement of specific delegations of authority herein ordered requires that the working relationships of the Broadcast Bureau with other bureaus and staff offices be defined as to joint areas of responsibility. A new section (0.282) has been added for this purpose.

4. Authority for the adoption of this Order is contained in section 5(d) of the Communications Act of 1934, as amended. Since it relates to internal Commission management, practice, and procedure, and because the early implementation of these changes will expedite the transaction of public business, compliance with the notice and effective

date provisions of the Administrative Procedure Act (5 U.S.C. 553) is not required.

5. Accordingly, IT IS ORDERED, That effective November 13, 1973, section 0.281 of the rules IS AMENDED, and a new section (0.282) IS ADDED in the manner set forth in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 0.281 is amended to read as follows:

§ 0.281 *Authority delegated.*

The performance of functions and activities described in section 0.71 of this part is delegated to the Chief, Broadcast Bureau: *Provided,* That the following matters shall be referred by the Chief, Broadcast Bureau, to the Commission *en banc* for disposition:

(a) *Applications.* Formal and informal applications for new or modified AM, FM, and TV facilities, and for the renewal, assignment, and transfer of construction permits and licenses involving such facilities, when such applications fail to satisfy the requirements of Commission rules or established Commission policy in the following areas of special concern:

(1) *Multiple ownership, concentration of control, and cross-interests.*

(i) Acquisition of a third broadcast station within 100 miles of a presently owned station; "one-to-a-market" situations involving UHF stations or TV satellite stations; and duopoly situations involving TV satellite stations. (Commonly owned AM and FM stations in the same market are treated as one station for the purpose of the "third station" limitation.)

(ii) Acquisition of a broadcast station by a newspaper in the same area, or other organization having substantial interests in the print media in the same area.

(iii) Creation of common ownership interests, management ties, or employment relationships between licensees serving substantial common areas and populations. Commonality of areas and populations served shall be determined in duopoly situations by overlap of the following service contours: AM—1 mVm; FM—1mVm; and TV—Grade B. In "one-to-a-market" situations, commonality of areas and populations served shall be determined by community encompassment with the following service contours: AM—2 mVm; FM—1 mVm; and TV—Grade A.

(iv) Acquisition of broadcast properties by corporations or individuals appearing to dominate the economic life of the community.

(2) *Trafficking.* Acquisition of broadcast properties by persons having a history of short term buying and selling such properties, or seeking waiver of the "three-year rule" (section 1.597) when the seller will realize a profit.

(3) *Anti-trust activity, unfair trade practices, and violations of law not previously considered by the Commission.*

(i) Proposals by applicants against whom communications-related anti-trust suits are pending or against whom there is pending any anti-trust suit in which an adverse verdict has been reached.

(ii) Proposals by applicants who have entered into a consent decree, have pleaded guilty or *nole contendere,* or have been adjudged guilty in an anti-trust case during the three-year period preceding the filing of the application.

(iii) Proposals by applicants who have been the subject of a final cease and desist or consent order issued by the Federal Trade Commission during the three-year period preceding the filing of the application.

(iv) Proposals by applicants or including parties with felony or capital offense conviction records, or against whom a criminal proceeding is pending.

(4) *Violations and complaint matters.* Proposals filed by applicants against whom violation notices of a serious nature are outstanding or against whom questions suggesting serious misconduct remain unresolved, or by applicants with records of serious past misconduct.

(5) *Equal employment opportunities.* Proposals filed by applicants whose equal employment opportunities programs do not comply with Commission rules or policies and cannot be cleared by further staff inquiry or action, or whose past performance suggests the existence of discriminatory practices.

(6) *Short term licenses and renewals.* Proposals which in the opinion of the Chief, Broadcast Bureau, warrant the issuance of a short-term license or renewal authorization.

(7) *Programming: commercial matter.*

(i) Commercial AM and FM proposals in non-seasonal markets exceeding 18 minutes of commercial matter per hour, or providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation, or, during periods of high demand for political advertising, providing for exceptions permitting in excess of 22 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

(ii) Commercial AM and FM proposals in seasonal markets (e.g., resort markets) exceeding 20 minutes of commercial matter per hour, or providing for exceptions permitting in excess of 22 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

(iii) Commercial TV proposals exceeding 16 minutes of commercial matter per hour, or, during periods of high demand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

(8) *Programming: program content and ascertainment of community needs.*

(i) Commercial AM, FM, and TV proposals for less than 8, 6, and 10 percent, respectively of total non-entertainment programming.

(ii) Commercial AM, FM, and TV proposals containing substantial ascertainment defects which, for any reason, cannot be resolved by further staff inquiry or action.

(9) *Programming: substantial shifts in format.* Commercial AM, FM, and TV applications disclosing substantial changes affecting either the entertainment or non-entertainment portions of existing formats which raise significant public interest questions, or which are opposed by the listening or viewing public.

(10) *Programming: promise versus performance.* Commercial AM, FM, and TV renewal, transfer, and assignment applications which vary substantially from prior representations with respect to non-enter-programming or commercial practices.

(11) *Hearing Orders.*

(i) Mutually exclusive applications involving non-routine hearing issues.

(ii) Renewal, assignment, and transfer applications which appear to call for evidentiary hearing.

(iii) Such other applications, as in the opinion of the Chief, Broadcast Bureau, warrant referral to the Commission prior to designation for hearing.

(12) *Interference and mileage separations.* Proposals for new or modified AM, FM, and TV facilities which would create substantial new prohibited overlap or station separation shortages. In the case of AM proposals (other than Class IV), a net increase in objectionable interference to another AM station involving more than 1 percent of the population served by such other station, whether or not consented to by the station affected, shall be referred to the Commission.

(13) *Station location.*

(i) Commercial AM, FM, and TV proposals which, on their face, appear realistically intended to serve another community of larger size. Signal penetrations of 5 mV/m (AM), 3.16 mV/m (FM), and city grade (TV) shall be used in determining whether referral to the Commission is appropriate.

(ii) Any other such proposal raising allocations problems or presumptions under section 307(b) of the Communications Act which, for any reason, cannot be resolved by further staff inquiry or action.

(14) *Main studio relocation.* All AM, FM, and TV proposals for main studio relocation, or for waiver of main studio program origination requirements, under circumstances which have traditionally been viewed as creating a *de facto* change in station location.

(15) *VHF television expansion.* Commercial VHF television proposals seeking to bring or extend their Grade B contours into a significant area or population included within the predicted Grade B contour of a UHF television station where

the area or population involved is covered by fewer than 4 VHF television signals.

(16) *Agreements to amend or dismiss applications.* Any situation in which a community will be deprived of a proposed broadcast station by reason of amendment or dismissal of an application mutually exclusive with another application for a different community.

(17) *Experimental and development operation.* Proposals for experimental and developmental authority containing policy implications which, in the opinion of the Chief, Broadcast Bureau, warrant referral to the Commission.

(18) *Miscellanous applications and requests.*

(i) Proposals for special temporary, emergency, conditional, or interim operating authority of more than routine significance.

(ii) Any other application, proposal, or request presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

(b) *Petitions and other requests for Commission action.*

(1) Petitions to deny directed against AM, FM, and TV applications for new or modified facilities, or for renewal or assignment of license or transfer of control, when such petitions are timely filed and properly lie as a matter of law. Untimely and otherwise improperly filed petitions to deny; e.g., against applications for minor changes in facilities or applications for licenses to cover construction permits, will be processed as informal objections and will be referred to the Commission only if they contain new or novel arguments not previously considered by the Commission, or present facts or arguments which appear to justify a change in Commission policy.

(2) Petitions and other requests for reconsideration of actions taken by the Chief, Broadcast Bureau, when such petitions or requests contain new or novel arguments not previously considered by the Commission, or present facts or arguments which appear to justify a change in Commission policy.

(3) Applications for review of actions taken by the Chief, Broadcast Bureau, which comply with section 1.115 of this chapter.

(4) Petitions and other requests for waiver of Commission rules, whether or not accompanied by an application, when such petitions or requests contain new or novel arguments not previously considered by the Commission, or present facts or arguments which appear to justify a change in Commission policy.

(5) Petitions and other requests for declaratory rulings, when such petitions or requests contain new or novel arguments not previously considered by the Commission, or present facts or arguments which appear to justify a change in Commission policy.

(6) Petitions for, and final dispositions of, rule making proceedings except for the issuance of notices of proposed rule making (including orders to show cause, where appropriate) involving routine changes in the FM and TV tables of assignments.

(7) Petitions and other requests for waiver of the prime-time access rule, in areas where Commission policy is not clearly established.

(8) Petitions and other requests for long-term waiver of the policy limiting affiliations by commonly owned networks in the same market.

(9) Petitions and other requests for waiver of the sponsorship identification provisions of the Communications Act, in accordance with section 317(d) thereof.

(10) Any other petition, pleading, or request presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

(c) *Administration and enforcement.*

(1) Proposed orders to show cause why station licenses or construction permits should not be revoked.

(2) Proposed actions following any case remanded by the courts.

(3) Proposed Notices of Apparent Liability and final forfeiture orders involving penalties of more than $2,000.

(4) Proposed public notices expressing Commission policy, interpreting the provisions of law, regulations, or treaties, or warning the broadcast industry as to certain types of violations.

(5) Problems involving apparent violation of the Commission's rules governing equal employment opportunities or otherwise indicating the existence of discriminatory practices which, in the opinion of the Chief, Broadcast Bureau, or

the Equal Employment Opportunity Commission should be brought to the attention of FCC Commissioners.

(6) Any other complaint or enforcement matter presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.

2. Section 0.282 is added new to read as follows:

§ 0.282 *Actions taken under delegated authority.*

(a) In discharging the authority conferred by section 0.281 of this part, the Chief, Broadcast Bureau, shall establish working relationships with other bureaus and staff offices to assure the effective coordination of actions taken in the following areas of joint responsibility;

(1) Complaints arising under sections 315 and 605 of the Communications Act—Office of General Counsel.

(2) Objections to proposed call signs and requests for waiver of procedural rules governing call sign assignments—Office of Chief Engineer.

(3) Requests for waiver or refund of filing and/or grant fees—Office of Executive Director and Office of General Counsel.

(4) Requests for waiver of tower painting and lighting specifications—Field Engineering Bureau.

(5) Matters involving emergency communications—Office of Executive Director.

(6) Complaints involving equal employment opportunities—Office of General Counsel.

(7) Requests for use of frequencies or bands of frequencies shared with private sector nonbroadcast or government services—Office of Chief Engineer and appropriate operating bureau.

(8) Requests involving coordination with other agencies of government—Office of General Counsel, Office of Chief Engineer and appropriate operating bureau.

(9) Proposals involving transmitter sites on public lands owned or controlled by the Departments of Agriculture or Interior—Office of Chief Engineer.

(10) Proposals involving possible harmful impact on radio astronomy or radio research installations—Office of Chief Engineer.

(b) With respect to non-routine applications granted under authority delegated in section 0.281 of this part, the Chief, Broadcast Bureau or his designees, shall enter on the working papers associated with each application a narrative justification of the action taken. While not available for public inspection, these working papers shall, upon request, be made available to the Commissioners and members of their staffs.

(c) The Chief, Broadcast Bureau, shall prepare and submit to the Commission a quarterly statistical summary of actions taken during the preceding quarter under authority delegated to him in section 0.281 of this part. The statistical summary shall be accompanied by a statement of industry trends apparent in the staff handling of non-routine matters during the same quarter.

DISSENTING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

The Commission has today amended its rules by setting forth those broadcast matters that must be decided by the full Commission. By implication those not listed are delegated to the Broadcast Bureau Chief.

This method should fulfill our purpose of informing interested parties of the Bureau's authority. That the effort was made at all, I applaud. But I am forced to voice my dissent because of a number of significant omissions.

I start with the general proposition that all operating bureaus in this Commission should resolve all matters on a delegated basis. There are, of course, some exceptions. However, any system of delegation can operate smoothly and effectively only if (1) the bureaus have clear and precise policy guidelines from the Commission, and (2) the Com-

mission has a management information reporting system by which meaningful and substantive information on delegated actions is frequently submitted to the Commissioners for review. Such reports must be more than mere statistical summaries; they should contain a substantive analysis of a variety of trends and shifts taking place in the various regulated industries; and those trends should be measured against previously identified goals, measurable standards of performance and predictions.

Should the Commissioners have available such substantive information on a frequent basis, our job then would be to provide knowledgeable guidance for future delegations—and occasionally to review a staff action after appeal. My experience leads me to believe that the Commission's operating bureaus would be quite capable of performing this role.

On the other hand, to allow our bureaus to function without sufficient feedback simply undercuts our role as defined by Congress and as required by any reasonable standards of administration and management.

It is my view that the amended rules do not make available to us the kinds of information needed to enable us to perform our statutory function. Beyond these general observations, here are some of the specific rule provisions with which I disagree:

1. I requested that a new subsection (v) be added to 0.281(a)(1) to require that applications raising issues of local, regional, or national concentration of control be passed upon by the Commission. The proposed regulations would delegate to the staff cases in which an applicant desires to acquire his third AM which is further than 100 miles from either of the other two. While the Broadcast Bureau assures us that these types of cases will continue to be brought to our attention, our rules should inform the parties that such review will be by the Commissioners. The proposed rule needs a "catch-all" subsection to allow the Commission an opportunity to pass on these vital issues. Existing multiple ownership rules, in addition to imposing numerical limits on ownership, require that these concentration of control issues be passed upon by the Commission. The proposed rule really only treats one aspect of the multiple ownership rules and a new subsection (v) would cure this defect. While the Bureau believes that our suggestion would cause more work for the Commissioners, we retain the option of modifying our practices as experience dictates.

2. Under proposed section 0.281(a)(2), I suggested that the following language be deleted: ". . . when the seller will realize a profit in excess of $10,000." This phrase is irrelevent because the existence of a profit is not determinative of the issue of trafficking.

3. I recommended that section 0.281(a)(3)(i) be revised to read: "Proposals by applicants against whom antitrust suits are pending which may reflect on the basic qualifications of the applicant." The Broadcast Bureau staff objected, finding that such language would increase the number of cases referred to the Commissioners. Again, we retain the option of modifying our practices, but since the Bureau proclaims that it is already reducing our workload by 50% with the amended rules, we could well adopt this change and still retain a substantial savings. The amended rule is too restrictive, and working

under it would remove from our consideration items like the RKO, GE, and Westinghouse cases, which were not "communications-related." Antitrust suits can cover many areas of a licensee's qualifications, and our delegation rules should not be limited to "communications-related" suits.

4. Section 0.281(a) (16) provides that the Commissioners will decide cases where a community will be deprived of a proposed broadcast station due to agreements that either amend or dismiss applications mutually exclusive with another application for a different community. As written, however, this section will delegate to the Bureau the authority to pass on agreements which either amend or dismiss applications specifying the same community including agreements where consideration has been paid or promised by an applicant for removal of a conflict with a mutually exclusive application. While the existing language of the section meets my approval, I believe that the staff is given too broad a responsibility on matters where little policy guideline exists from the Commission.

5. My main objection to the amended rules lies in section 0.282(c), regarding the reporting procedures the Bureau will follow. As written, this section fails to provide us with some firm commitment as to exactly what the Bureau will be providing the Commission during the coming months and years. We need useful substantive information on actions taken under delegated authority. Today's rule amendments lack this clarity, and without it effective management of the Commission's activities by the seven Commissioners becomes an impossible task.

For all of these reasons I reluctantly dissent.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
KARL E. SMITH, AUBERRY, CALIF.
Concerning Fairness Doctrine Re NBC, CBS, and ABC

JUNE 6, 1973.

Mr. KARL E. SMITH,
Box 167,
Auberry, Calif.

DEAR MR. SMITH: This is in response to your letter of March 28, 1973, supplemented on April 4 and 22, concerning alleged fairness doctrine violations by NBC, CBS and ABC. You contend that the networks in their programming regarding automobile safety have failed in their obligations under the fairness doctrine to afford a reasonable opportunity for the presentation of views on the issue of automobile mirrors; that as the inventor of the Smith over-the-roof automobile mirror, which you assert has been tested and found to give greater road vision than any other mirror, you have requested time to present your views and demonstrate your mirror's superiority over the rear view mirrors commonly used; and that these requests have been denied.

In support of this allegation, you further state that the Department of Transportation (DOT) has estimated that auto mirrors account for 22.5% of all auto accidents, and since the auto industry has stated that there is no solution to the auto vision problem, you feel that your over-the-roof mirror solves this problem and should be presented to the public. In addition, you have also submitted copies of correspondence between the networks and you, wherein they acknowledged your contribution to safer automobile travel, but noted that they were not aware of any general public controversy concerning your automobile mirror and would have to investigate the matter further before they committed themselves to covering your story.

The Commission is prohibited by Section 326 of the Communications Act of 1934, as amended, from censoring broadcast material. Except in cases involving political candidates and personal attacks, it does not direct its licensees as to what particular programs are to be presented or rejected, and there is no provision of the Constitution or of any statute or regulation guaranteeing to any person the use of a microphone for the presentation of broadcast material. Therefore, the licensee is under no obligation to permit any person to present his views. However, under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford a reasonable opportunity for the presentation of contrasting views. Whether a topic is a controversial issue of public importance is initially determined by the network or licensee involved, which is expected to make judgments regarding the selection and presentation

of broadcast material in light of what it has learned concerning the problems, needs and interests of the area it serves. It is the responsibility of the broadcast licensee to determine initially whether a controversial issue of public importance has been presented, and the Commission's role is not to substitute its judgment for that of the licensee regarding its programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

It appears that NBC, CBS and ABC do not consider the question concerning automobile mirrors a controversial issue of public importance as related to the overall issue of automobile safety. Although the material you have furnished the Commission may indicate that corrective measures are needed to improve automobile vision, you have not shown that this matter is the subject of such public debate or controversy as to create a controversial issue of public importance under the fairness doctrine. Although there may be a divergence of opinion on the issue of auto mirrors, such diverse opinion by experts would not in and of itself indicate that there is a cognizable public controversy on auto mirrors. A contrary approach to fairness would tend to involve such technical and abstruse matters as to risk making the fairness doctrine overly theoretical and not a practical solution to the handling of important public issues. The Senate Hearing and Department of Transportation standards, to which your complaint refers, may raise various issues regarding the overall problem of automobile safety and certain aspects thereof which may be of interest to the public. C.f. *Dorothy Healy*, —— U.S. App. D.C. ——, 460 F. 2d 917 (1972). However, this is no indication that there is any substantial public controversy involving automobile mirrors per se.

In view of the foregoing, it cannot be said that the networks have acted unreasonably or in bad faith in the matter and no further Commission action appears warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-1129

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 0 OF THE COMMISSION'S RULES TO PROVIDE FOR REORGANIZATION OF THE FIELD ENGINEERING BUREAU

ORDER

(Adopted October 31, 1973; Released November 1, 1973)

BY THE COMMISSION:

1. The tremendous growth of non-government radio communications services in recent years has placed many demands upon the Commission's field activities. Several studies conducted both internally and externally have indicated a need for restructuring the Field Engineering Bureau so as to improve its management efficiency and operational effectiveness. Accordingly, the Commission has reorganized the Field Engineering Bureau so as to strengthen its ability to carry out its assigned functions.

2. Because these amendments relate to internal agency organization, the prior notice, procedural and effective date provisions of the Administrative Procedure Act (5 USC 553) do not apply. Authority for these amendments is contained in Sections 4(i), 5(b), 5(d), and 303(r) of the Communications Act of 1934, as amended.

3. IT IS ORDERED, That, effective November 13, 1973, Part 0 of the Rules and Regulations is amended as set forth in the Appendix attached hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 0.111 is revised to read as follows:

Field Operations Bureau

§ 0.111 Functions of the Bureau

The Field Operations Bureau is responsible for all Commission engineering activities performed in the field relating to radio stations including station inspections, surveys, monitoring, direction finding, signal measurement, and investigations; for those enforcement activities performed in the field dealing with the suppression of interference and the inspection of devices possessing electromagnetic radiation characteristics; and such other field inspections, investigations, or monitoring as might be required by the Commission or the bureaus and staff offices. The Bureau also performs the following functions:

* * * * * * *

2. Section 0.112 and headnote are revised to read as follows:

§ 0.112 Units of the Bureau

The Bureau consists of the following units:

(a) Office of the Bureau Chief
(b) Enforcement Division
(c) Regional Services Division
(d) Engineering Division

3. Section 0.113 is revised to read as follows:

§ 0.113 Office of the Bureau Chief

The Office of the Bureau Chief plans, directs, and coordinates the activities of the Bureau including its field activities.

4. Section 0.114 and headnote are revised to read as follows:

§ 0.114 Enforcement Division

The Enforcement Division is responsible for:

(a) Radio monitoring including coordinating Commission monitoring activities with centralizing offices for international monitoring in other countries, with other Federal Government agencies, and with industry self-help groups. The monitoring stations, whose operations are directed and the results evaluated by this Division, perform surveillance of the radio spectrum, detect and locate illegal radio stations and sources of interference, enforce radio laws and regulations, gather facts through monitoring and engineering measurements to resolve interference problems and to assist the Commission in rulemaking, participate through direction finding in search and rescue operations involving distressed ships and aircraft, and perform monitoring and direction finding work under contractual arrangements with other Federal governmental agencies.

(b) The inspection functions of the Bureau, including responsibility for the development and making of recommendations with respect to the priority and frequency of station inspections.

(c) Planning enforcement and investigative programs for the Bureau; directing and supervising investigations by the field enforcement facilities; and maintaining liaison with other bureaus and offices of the Commission with respect to the conduct of investigations in their behalf.

(d) The enforcement of Parts 15 and 18 of this chapter relative to equipment, interference and related problems involving the devices and equipment regulated by these parts.

(e) Directing and evaluating the activities of the field enforcement installations.

5. Section 0.115 and headnote are revised to read as follows:

§ 0.115 Regional Services Division

The Regional Services Division is responsible for:

(a) The examination functions of the Bureau, including responsibility for Part 13 of this chapter concerning the licensing of commercial radio operators, and recommending action on matters of noncompliance with rules, acts, or treaties by these operators.

(b) The administration, interpretation and revision of Part 17 of this chapter governing construction, marking, and lighting of antenna structures, including the processing of data concerning proposed new or modified antenna construction to insure no hazard to air navigation results from the proposed construction; liaison with the Federal Aviation Administration in respect to matters concerning antenna tower construction and antenna hazards.

(c) The review and action upon certifications of individual equipment installations submitted to the Commission pursuant to Part 18 of this chapter.

(d) Directing and evaluating the activities of the public service offices.

6. Section 0.116 and headnote are revised to read as follows:

§ 0.116 Engineering Division

The Engineering Division is responsible for:

(a) The development of measuring procedures and techniques for the guidance of field personnel in performing engineering measurements.

(b) The determination of technical equipment and facilities requirements of all Bureau field installations in the conduct of their assigned duties and for the provision of such equipment and facilities.

(c) The determination of field real property requirements and for acquisition, administration, maintenance, and disposal of all Commission real property utilized for enforcement purposes including design of electrical, mechanical, environmental and civil engineering systems for needed physical plant facilities.

(d) The financial management of Bureau other object requirements including control of budget execution policies for all Bureau technical and real property financial resources utilization.

7. Section 0.311 headnote, par (a), (a) (1) and par (b) are revised to read as follows:

Field Operations Bureau

§ 0.311 Authority delegated to the Chief and to the Deputy Chief of the Field Operations Bureau.

(a) The Chief of the Field Operations Bureau is delegated authority to act upon the following matters which are not in hearing status:

(1) Except as otherwise provided in § 1.61 of this chapter, with respect to the construction, marking and lighting of antenna towers and supporting structures, to exercise the functions of the Commission as set forth in Part 17 of this chapter: Provided, however, That in cases in which the Federal Aviation Agency recommends denial of any application, the Chief of the Field Operations Bureau advises the bureau concerned in order that it may submit the application to the Commission for appropriate action.

* * * * * * *

(b) The Chief and the Deputy Chief of the Field Operations Bureau are authorized to declare that a state of general communications emergency exists and to act on behalf of the Commission pursuant to the provision of § 97.107 of this chapter with respect to the operation of amateur stations during a state of general communications emergency.

F.C.C. 73–1064

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (BRAZIL AND ROCKVILLE, IND.)	RM–2011

MEMORANDUM OPINION AND ORDER

(Adopted October 11, 1973; Released October 16, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration the petition for rule making and request for Order to Show Cause filed July 11, 1972, by Wabash Valley Broadcasting Corporation (Wabash Valley), licensee of television Station WTHI–TV, Terre Haute, Indiana.[1] Wabash Valley is seeking a change in the FM channel assignment at Brazil, Indiana, from Channel 249A to Channel 285A which may be made by substituting Channel 249A, for Channel 285A, an unoccupied channel, at Rockville, Indiana, and requests issuance of show cause order to the licensee of Station WWCM–FM at Brazil, Indiana, operating on Channel 249A. It appears that the second harmonic frequency of Channel 249A falls in the television band for Channel 10, and that Station WTHI–TV, operating on Channel 10, anticipates interference to its television broadcast service at Brazil, Indiana.[2]

2. Based on its experience at Vincennes, Indiana, where Channel 244A is assigned and the second harmonic frequency of which also falls in the television band for Channel 10, Wabash Valley contends that a Brazil station operating on Channel 249A would produce interference to its television broadcast service. It alleges that the anticipated interference would result from the generation of the second harmonic frequency within the receivers in areas of high ambient FM signal intensity, and that, where the high ambient FM signal is encountered in a densely populated area, the effect of the interference is notably widespread but also impracticable to remedy by the insulation of the many individual television receivers affected. Wabash Valley asserts that the only effective solution would be to substitute Channel 249A with another channel whose second harmonic falls beyond the Channel 10 band, and that the excellent choice would be to exchange the assignment with Channel 285A now assigned to Rockville, Indiana, and un-

[1] Also before the Commission are oppositions filed by (a) Spencer and Freeland Broadcasting, Rockville, Indiana, September 8, 1972; (b) Clay County Broadcasting Co., Inc., licensee of Station WWCM–FM, Brazil, Indiana, September 11, 1972; and (c) Vernon Kuehn, Rockville, Indiana, September 11, 1972, and reply to oppositions filed by Wabash Valley, September 26, 1972.

[2] The construction permit to operate on Channel 249A at Brazil, Indiana, was granted to Clay County Broadcasting Co., Inc., on September 6, 1972 (BPH–7737) and the FM broadcast license was granted December 5, 1972 (BLH–5649).

occupied. However, the transmitter site for Channel 249A at Rockville would have to be located seven miles east of the community. It argues that the added benefit by this move would be that the second harmonic interference to WTHI–TV reception from the operation of Channel 249A at Rockville would occur in a sparsely populated agricultural environment and thus the interference problem would be minimal.

3. Spencer and Freeland Broadcasting and Vernon Kuehn, the prospective applicants, oppose the proposed substitution of Channel 249A for Channel 285A at Rockville. They contend that, for the size of community, it would be more appropriate to locate the station in or near the town with studio and transmitter in one location, that the requirement to locate the transmitter site seven miles from the community would ill serve the residents of Rockville, and that a station operating from such a site would not serve the communities of Montezuma and Clinton as well as the neighboring county of Vermillion. Clay County Broadcasting in its opposition contends that the likelihood of interference is not as great as portrayed by Wabash Valley, that, since the distance between its FM site and the WTHI–TV site is only 23 miles, the television signal of Channel 10 at 23 miles will be 13 dB greater than the signal at 41 miles in the vicinity of Vincennes, Indiana; that there is practically no difficulty when the FM station is located close to the television station; and that in those cases where interference may result due to overloading of the television receivers, the problem can easily and inexpensively be fixed by installing an FM trap. It asserts that, if the interference results to Channel 10, Clay County Broadcasting will follow the procedures outlined in the Public Notice of September 1, 1967 (FCC 67–1012). In reply, Wabash Valley states that, while it is true that the kind of interference to television reception which it seeks to prevent becomes worse as the FM station transmitter becomes more distant from the television transmitter, the fact is that the Clay County transmitter on Channel 249A will be located in the center of a populated area estimated to contain a population of approximately 10,000 persons within the two-mile radius of the FM transmitter site; that this contrasts with a population density of no more than 1,000 persons in the vicinity of a hypothetical transmitter location on Channel 249A at Rockville; and that in this case, it is the population density, not the relative distance from the Channel 10 transmitter, which is the controlling factor.

4. The basis for the Wabash Valley request to change the FM channel assignment at Brazil, Indiana, is its experience at Vincennes, Indiana, located some 41 miles from the Station WTHI–TV transmitter site. It believes that a station operating on Channel 249A at Brazil, some 23 miles from its station, would produce a similar type of interference, and the anticipated interference problem could be rectified by exchanging the assignment with that of Rockville, Indiana, located some 37 miles from its television station. Although it admits that the kind of interference it is seeking to eliminate becomes worse as the FM station transmitter becomes more distant from the television transmitter, it argues that the population density at Rockville would be less than at Brazil. Clay County Broadcasting has contended that no significant interference will result unless the viewers used outdoor antennas with boosters, and that a study of the Brazil

area reveals that the majority of the viewers use indoor antennas and no boosters. Clay County Broadcasting has stated that, if the interference should occur, it will follow the procedures outlined in the Public Notice of September 1, 1967 (FCC 67–1012) concerning FM Interference to TV Reception, which, among other things, recommends installation of FM traps and filters to cure the interference problems. It appears that denying the request would leave the channel assignment in the area of high population density where interference could occur, but the licensee of the FM station is willing to rectify interference problems if it were to occur. Further, it would not be necessary for a Rockville station to be located some seven miles from the community. In view of the above, the petition filed by Wabash Valley to exchange the FM channel assignments between Brazil and Rockville, Indiana, will be denied.

5. Accordingly, IT IS ORDERED, That the petition for rule making and request for Order to Show Cause, filed July 11, 1972, by Wabash Valley Broadcasting Corporation, licensee of Station WTHI–TV, Terre Haute, Indiana, IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-1142

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (WILMINGTON, ILL.; MANY, LA.; MOYOCK, N.C.; LAKE PROVIDENCE, LA.; NEWTON, MISS.; BAY SPRINGS, MISS.; YORK, ALA.; REHOBOTH BEACH, DEL.; CANTON, TEX.; BRANDON, MISS.; SOUTHPORT, N.C.; HARRISON, MICH.; GREENFIELD, MO.; BELHAVEN, N.C.; RUSTON, LA.; SHREVEPORT, LA.; BETHANY BEACH, DEL.; AND ALEXANDRIA AND FERRIDAY, LA.)	Docket No. 19690 RM-2003, *RM-2027*, RM-2046, RM-2051, RM-2054, RM-2057, RM-2058, *RM-2144*, RM-2059, RM-2062, RM-2068, RM-2085, RM-2097, RM-2098, RM-2100, *RM-2092*, RM-2160, and *RM-2194*

ORDER TO SHOW CAUSE

(Adopted October 31, 1973; Released November 7, 1973)

BY THE COMMISSION:

1. The Commission has under consideration the (a) Further Notice of Proposed Rule Making in the above-entitled proceeding, released May 21, 1973 (FCC 73-521, 38 Fed. Reg. 13658); (b) petition for rule making filed by United Communications, Inc., Alexandria, Louisiana, April 10, 1973, and supplemented May 2, 1973 (RM-2194); and (c) Public Notice, Report No. 868, June 1, 1973, accepting RM-2194 and stating that it would be treated as a counterproposal in this docket.

2. The petition for rule making submitted by United Communications, Inc., for assignment of FM Channel 226 to Alexandria, Louisiana, requires a change in the assignment of Station KFNV-FM at Ferriday, Louisiana, from Channel 228A to Channel 296A. That petition was consolidated into this docket because the change in the assignment at Ferriday, Louisiana, conflicts with the proposal to assign Channel 297 to Ruston, Louisiana.

3. The petitioner states that, if Channel 226 is assigned to Alexandria, Louisiana, and if it becomes a permittee of an FM station at Alexandria, Louisiana, on Channel 226, it will reimburse the reasonable and necessary expenses incurred as a consequence by the licensee of the station then occupying Channel 228A at Ferriday, Louisiana. This accords with Commission policy that where any change in the FM Table of Assignments requires an operating station to change its channel, the station is entitled to be reimbursed for the actual cost of the change. See, e.g., *Wenatchee*, 2 F.C.C. 2d 828, 7 R.R. 2d 1541 (1966); *Kenton and Bellefontaine*, 3 F.C.C. 2d 598, 7 R.R. 2d 1600 (1966); *Gretna and Danville*, 5 F.C.C. 2d 333, 8 R.R. 2d 1596 (1966);

and Circleville, 8 F.C.C. 2d 159, 9 R.R. 2d 1579 (1967). More importantly, however, Miss Lou Broadcasting Company, licensee of Station KFNV–FM, must be given an opportunity to indicate whether it consents to or is opposed to the proposed change of its channel assignment. And this Order is adopted for that purpose.

4. IT IS ORDERED, That, pursuant to Section 316 of the Communications Act of 1934, as amended, Miss Lou Broadcasting Company, licensee of Station KFNV–FM, Ferriday, Louisiana, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 296A instead of Channel 228A if the Commission in this proceeding finds it in the public interest to assign Channel 226 to Alexandria, Louisiana, and to substitute Channel 296A for Channel 228A at Ferriday, Louisiana; this order being made with the understanding that the permittee of Channel 226 at Alexandria, Louisiana, will pay reasonable reimbursement of expenses incurred in the change of channel of operation of Station KFNV–FM at Ferriday.

5. Pursuant to Section 1.87 of the Commission's Rules and Regulations, the licensee of Station KFNV–FM, may, not later than December 14, 1973, request that a hearing be held on the proposed modification. Pursuant to Section 1.87(f), if the right to request a hearing is waived, Miss Lou Broadcasting Company may, not later than December 24, 1973, file a written statement showing with particularity why its license should not be modified or not so modified as proposed in the Order to Show Cause. In this case, the Commission may call on Miss Lou Broadcasting Company to furnish additional information, designate the matter for hearing, or issue without further proceeding an order modifying the license as provided in the Order to Show Cause. If the right to request a hearing is waived and no written statement is filed by the date referred to above, Miss Lou Broadcasting Company will be deemed to consent to modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re the Applications of FWS RADIO, INC.	File No. 2201-C2-P-69
PAGE A FONE CORP.	File No. 3399-C2-P-69
MORRISON RADIO RELAY CORP.	File No. 3039-C2-P-69
GENERAL TELEPHONE CO. OF THE SOUTHWEST For Construction Permit To Establish New Facilities in the Domestic Public Land Mobile Radio Service in the Dallas-Fort Worth, Tex., Area	File Nos. 4572/4578-C2-P-69

MEMORANDUM OPINION AND ORDER

(Adopted October 25, 1973; Released October 26, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration a Motion for Stay Pendente Lite, filed September 21, 1973, by RAM Broadcasting of Texas, Inc., (RAM). The Motion requests that the Commission stay the effect of its action in the above-captioned matter, taken by Memorandum Opinion and Order released April 30, 1973, (FCC 73-436, 40 FCC 2d 680), and affirmed by our Memorandum Opinion and Order released August 23, 1973, (FCC 73-876, ——FCC 2d——), insofar as that action granted the applications of FWS Radio, Inc. (FWS), Page A Fone Corporation (Page A Fone) and Morrison Radio Relay Corporation (Morrison). RAM's motion was opposed by these three permittees in pleadings filed September 28, 1973.

2. In support of the requested stay, RAM states that it has filed a Notice of Appeal (*RAM Broadcasting of Texas, Inc.*, v. *F.C.C.* 73-2010) with the Court of Appeals for the District of Columbia Circuit, pursuant to Section 402 of the Communications Act of 1934, as amended, appealing from the Commission's denial of reconsideration of the action of April 30, 1973. It further states that if the stay is not granted it will suffer irreparable injury; that it is likely to prevail on the merits; that a stay will not unduly prejudice the permittees herein; and that the public interest requires a stay. The opposing pleadings challenge all these contentions.

3. We do not think it necessary to summarize the pleadings more fully, since RAM has relied almost entirely on arguments which have already been considered and rejected in our Order of August 23, 1973. RAM's other contentions are vague and conclusionary, and we can see

nothing that would justify the issuance of a stay order (see *Clarkston Broadcasters*, 24 FCC 2d 288 (1970)). In our decision of August 23, 1973, we rejected RAM's claim of injury, and found that grant of the construction permits would serve the public interest. Also, RAM has not offered any new reasons which would convince us that it is likely to prevail on the merits.

4. Accordingly, IT IS ORDERED, That the motion for stay pending appeal filed by RAM Broadcasting of Texas, Inc., on September 21, 1973, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT MULLINS, *Secretary.*

F.C.C. 73R-300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH-7669
EDWARD ROYCE STOLZ, II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH-7924
For Construction Permits	

ORDER

(Adopted August 21, 1973; Released August 22, 1973)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the motion filed on August 20, 1973, by Intercast, Inc., for a further extension of time to and including August 27, 1973, within which to file oppositions to the second petition to enlarge issues filed by Edward Royce Stolz, II, tr/as Royce International Broadcasting, on July 27, 1973;

2. IT APPEARING, That counsel for the other parties have indicated to petitioner their consent to a grant of the relief requested;

3. IT IS ORDERED, That the motion for further extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-316

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH-7669
EDWARD ROYCE STOLZ, II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH-7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted September 4, 1973; Released September 6, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER CONCURRING IN THE RESULT.

1. By Memorandum Opinion and Order, FCC 72-916, released October 19, 1972, the Commission designated the above-captioned mutually exclusive applications for a new FM broadcast station in Sacramento, California, for a comparative hearing on various issues.[1] Before the Review Board is a petition to enlarge issues, filed by Stolz on June 19, 1973, requesting the Board to add legal qualifications and Rule 1.65 issues against Intercast.[2]

2. In support of its request, Stolz alleges that Intercast's corporate status has been suspended without reinstatement since April 3, 1972, because of its failure to pay California state franchise taxes.[3] Throughout this period, petitioner contends, Intercast has failed to comply with the requirements of Section 1.65 of the Commission's Rules by not advising the Commission of the suspension. Instead, petitioner contends, Intercast continues to prosecute its application as if it were a viable corporation and, by so acting, has either been doing business in contravention of California laws,[4] or has been relying on undisclosed individuals for the financing it needs to prosecute its application. Its petition is timely, Stolz opines, because there was no reason for it to become suspicious while Intercast continued to carry

[1] California Stereo, Inc.'s application was also designated for consolidated hearing with the applications filed by Intercast, Inc. (Intercast) and Edward Royce Stolz, II (Stolz), but its application was subsequently dismissed with prejudice for want of prosecution. See the Administrative Law Judge's Order, FCC 73M-444, released April 11, 1973.

[2] Also before the Board for consideration are: (a) the Broadcast Bureau's comments, filed June 27, 1973; (b) opposition and petition to file supplement thereto, filed July 12 and July 16, 1973, respectively, by Intercast; and (c) reply, filed July 27, 1973, by Stolz. The Board will grant Intercast's unopposed petition to file a supplement to its opposition because its purpose is merely to provide a copy of a document which Intercast intended to attach to its opposition but inadvertently did not.

[3] A copy of a certificate by the California Secretary of State which is attached to the instant petition reveals that Intercast was also suspended as a corporation once before on February 16, 1971, for failure to pay franchise taxes, and that it was revived on February 22, 1971. Intercast was initially incorporated in California on March 4, 1970.

[4] In support, petitioner cites sections of the Revenue and Taxation Code of California which, it maintains, provide fines and/or imprisonment for persons who willfully fail to file a return or who attempt to exercise the privileges of a corporation whose rights have been suspended.

out its corporate functions and prosecute its application as if there had never been a suspension. Petitioner only learned of the actual circumstances, it maintains, "by acting on a hunch."

3. In opposition, the Broadcast Bureau and Intercast contend that Stolz fails to show either good cause for the untimeliness or that it meets the *Edgefield-Saluda* test.[5] In addition, the Bureau contends, the issues are unwarranted since the nonpayment of the taxes was merely a failure to meet a technical requirement which can be cured easily by the applicant who has otherwise consistently and aggressively prosecuted its application. In this regard, Intercast attaches to its opposition copies of a certificate from the Secretary of State of California and a Certificate of Revivor issued by the State stating that Intercast has paid all the required outstanding taxes and that its corporate powers, rights and privileges were reinstated and revived on June 27, 1973.[6] Intercast contends, moreover, that its Board of Directors has recently ratified the actions taken on behalf of the corporation during its suspension[7] and that this action, together with its reinstatement, resolve any question concerning its legal qualifications to hold a license and any questions which may have existed concerning the validity of the actions it took during the suspension. Regarding the alleged Rule 1.65 violation, Intercast contends that none of its principals knew about the suspension until its president was advised by counsel that the instant petition had been filed. Therefore, Intercast contends, if there were a violation, it was unintentional and inadvertent. Supported by three affidavits of its principals, Intercast maintains, first, that it had relied on a public accountant to file the corporation's franchise tax and to inform it when the tax was due, but that he apparently was remiss after contracting a terminal disease; and, second, that the notice of suspension issued in April 1972 was never received because the State agency responsible for collecting the taxes had an incorrect address for the corporation. Intercast contends, furthermore, that since it could have obtained reinstatement at any time and did so promptly on learning of the suspension, any violation of Section 1.65 was a technical one not warranting the addition of an issue.

4. In reply, Stolz reasserts that its petition is timely, but contends that, regardless, the *Edgefield-Saluda* case supports its request since the questions that it raises concern Intercast's basic qualifications and should be considered irrespective of the effect upon the orderly and fair administration of the Commission's business. Citing various California cases and statutes, petitioner also maintains that Intercast's reinstatement and the subsequent resolution by its Board of Directors do not validate the actions it took during its fifteen-month suspension. Petitioner opines that the Board should not leave the determination of Intercast's status during the period of its suspension to the State since the questions raised in the petition involve the applicant's legal qualifications.[8] Finally, petitioner maintains that it is difficult to believe

[5] *The Edgefield Saluda Broadcasting Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966).
[6] Intercast cites several California decisions to support its contention that ". . . reinstatement resolves any question concerning Intercast's prosecution of its application."
[7] A copy of the resolution of the Board of Directors is attached to Intercast's supplemental opposition (see note 2, *supra*).
[8] Stolz also maintains that giving full force and effect to Intercast's reinstatement and its Board's ratification validating acts performed during the suspension would deny petitioner due process in this proceeding since these acts occurred after the hearing record was closed.

Intercast's principals had no notice of the suspension. Stolz contends that they should have known when the taxes were due, particularly since Intercast had been suspended only the preceding year for the same reason.

5. The Review Board is of the opinion that Stolz filed its petition inexcusably late and that no good cause for the untimeliness has been shown. Petitioner's explanation that it only learned of the information upon which its petition is based "by acting on a hunch" is too vague to adequately excuse the untimeliness. Moreover, on its merits, the petition is also deficient. Intercast is no longer under any disability because of its suspension. Its corporate powers, rights and privileges have been reinstated and revived following its payment of the outstanding taxes due the California Franchise Tax Board, and this would seemingly moot any question concerning its prospective corporate activity in prosecuting its application. With regard to the legality of Intercast exercising its corporate powers once suspended, and the effect the subsequent reinstatement by the State and the ratification of Intercast's Board of Directors validating acts performed during the suspension, the Board has traditionally declined to interfere in questions of alleged state law violations where no challenge has been made in the state courts and the determination is one that is more appropriately a matter of state resolution. And, contrary to petitioner's assertion, this principle has been applied in denying requests for issues to inquire into an applicant's basic legal qualifications. See *North American Broadcasting Co., Inc.*, 15 FCC 2d 979, 15 RR 2d 311 (1969). As for the Rule 1.65 issue, the Board has no reason to doubt Intercast's assertions that none of its principals knew about the corporation's suspension until after the instant petition was filed. There is no evidence of intent to withhold pertinent information from the Commission, and, since this appears to be an isolated incidence of carelessness[9] by an applicant who has otherwise aggressively prosecuted its application, and the violation is of questionable significance, the issue will not be added. See *Auburn Publishing Co.*, 34 FCC 2d 134, 24 RR 2d 29 (1972); *Harvit Broadcasting Corp.*, 32 FCC 2d 656; 23 RR 2d 328 (1971).

7. Accordingly, IT IS ORDERED, That the petition for leave to supplement opposition to petition to enlarge isues, filed July 16, 1973, by Intercast, Inc., IS GRANTED, and the supplement IS ACCEPTED; and,

8. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed June 19, 1973, by Edward Royce Stolz, II, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[9] To insure against future similar suspensions, Intercast has, it maintains, hired a new accountant and provided the State Franchise Tax Board with the corporation's correct address.

F.C.C. 73–1103

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM–690

APPEARANCES

On behalf of The Western Union Telegraph Company: *Richard C. Hostetler, Esquire;* On behalf of ITT World Communications Inc.: *Joseph J. Jacobs, Esquire;* On behalf of Western Union International: *Robert E. Conn, Esquire;* On behalf of RCA Global Communications, Inc.: *Carl J. Cangelosi, Esquire;* On behalf of TRT Telecommunications Corporation: *E. Edward Bruce, Esquire.*

MEMORANDUM OPINION AND ORDER

(Adopted October 25, 1973; Released October 30, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On October 1, 1973, the Commission *en banc* heard oral argument supported by written briefs, on the following question:

Under what circumstances, if any, may the Commission grant the request of Western Union, in whole or in part, for an interim increase in landline charges for outbound and inbound international messages?

The argument was prompted by a request by The Western Union Telegraph Company (WU) that, pending an ultimate ruling on its original petition for increases in its share of international message tolls, we grant, without hearing,[1] an interim increase in the currently prescribed charges received by it for handling of outbound and inbound international messages from 6.5 cents to 11.5 cents per word for full-rate messages and from 3.25 cents to 5.75 cents per word for letter

[1] Section 222(e)(3) reads as follows: Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among the telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.
Section 201(a) reads as follows: It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

telegrams with proportionate increases in other message classes. The original pleading requested an increased division of charges from 6.5 cents to 13 cents a word for full-rate messages and from 3.25 cents to 6 cents for letter telegrams with proportionate increases in other classes, and was incorporated in this proceeding, together with a number of related issues concerning the pickup and delivery of international messages.

2. We have concluded that the record as it stands does not support a grant of the WU request for interim relief. We shall briefly summarize the positions of the parties.

3. WU in support of its request for interim relief maintains that it is faced with an immediate crisis in the form of severely depressed earnings from its Public Message Service (PMS) requiring immediate remedial relief. It asserts that in 1972 it incurred losses of over $15 million in providing total PMS, or a negative 8.9% return on investment, and that over two-thirds ($10.4 million) of this PMS deficiency has been incurred in the landline handling of international telegrams. Also, the results of a cost study, based on 1972 operating experience, show (assuming a pretax return of 18%) that the revenue requirement for the landline haul was $29.6 million conpared to actual landline haul revenues of $14.2 million.[2] WU is amenable to an order requiring it to account for any increased charges collected from the international record carriers (IRC's) and remit such portion, if any, of the interim increase found, after hearing, to be excessive. Referring to the 1972 annual reports of the IRC's, WU contends that their overall rate of return levels indicate that they could absorb the proposed increases without seriously impairing their revenues. However, WU notes that, the Commission could alternatively allow the IRC's to increase their charges to the public by an amount sufficient to offset any increases in charges the Commission may allow to WU, subject to an accounting and refund. On the basis of the foregoing, WU asserts that there is sufficient evidence before us to conclude that:

(a) It faces a crisis of severely depressed earnings in providing international PMS under currently-prescribed division of charges;
(b) a final prescription of new divisions is not feasible without substantial delays; and
(c) the legitimate interests of the IRC's and the public can be protected by accounting orders.

4. With respect to the ability of the Commission to grant interim relief in advance of a hearing, the thrust of WU's argument is that the Commission may take such actions which are not expressly prohibited or inconsistent with any particular section of the Act in carrying out its responsibilities to further the ends of justice and the public interest. It asserts that no section of the Act, including 222(e)(3), precludes interim action. While WU concedes that 222(e)(3) mandates that a full hearing be held before the Commission may by order prescribe a division of charges, it stresses that it does not seek a final prescription order but rather a temporary increase, pending a full hearing.

[2] The foregoing figures are supported by affidavits attached to the amended complaint. Copies of work papers underlying the affidavits were furnished to the Commission and the IRC's.

5. The IRC's argue that the Commission cannot order them to pay to WU any increased divisions, even on an interim basis, without observing the hearing requirements of Sections 222(e) and 201(a) of the Communications Act, and that to do so would be a deprivation of property without due process of law. The IRC's disagree with WU on the interpretation to be given to the Communications Act, cases arising thereunder, and cases arising under similar provisions of other acts. It is suggested that, even absent a statutory requirement for hearing, procedural due process would require a hearing prior to any grant of the WU request for interim relief, in view of the possible effect such transfer of revenues could have on the IRC's. It is asserted that the grant of interim relief is equivalent to a prescription, as that term is used in Section 222, and that the effect of such grant is equivalent to a rate decrease, which can only be ordered after hearing.

6. Aside from their contentions that, as a matter of law, no relief can in any event be ordered pending a hearing otherwise required by the Communications Act, the IRC's urge that WU has failed to substantiate its assertion that relief is so urgently needed that the Commission should grant it on an interim basis. Thus, they stress that WU's claims of financial crisis are directed only to deficits in its PMS, not to its overall financial position, and that WU has not demonstrated an emergency such as imminency of bankruptcy or an inability to meet its interests payments. Moreover, the IRC's take issue with the theory and application of WU's cost allocation procedures. Even should WU be correct on its cost presentation, the IRC's assert that they cannot absorb the interim increase sought, and cannot pass it on to the public without a loss in revenues because of demand elasticity. Finally, it is alleged that the administrative details and costs associated with the maintenance of accounting records by the IRC's, as suggested by WU, incident to an increase in PMS charges, would be impractical and unnecessarily burdensome.

DISCUSSION

7. In our judgment, the record before us is not adequate to make responsible findings that interim relief is warranted. Although WU's cost presentation indicates that it is earning a negative return on PMS, there is not such a clear showing of imminent harm to the public as to warrant the extraordinary relief sought. Nor, as pointed out by the IRC's, is WU's allocation of such deficit to the international segment of its PMS sufficiently free from question as to establish a clear claim for the interim increase sought.

8. Accordingly, we think the most appropriate course for us to follow is to set for expedited hearing the entire matter of WU's request for increase in landline charges. In this connection, we should stress that such action does not bar WU from renewing its request for interim relief should subsequent developments indicate that such renewal is appropriate. We realize that, should increased charges be warranted, the IRC's may seek increases in rates for international telegraph message traffic to offset increased payments to WU for the landline handling of such traffic. However, this is a matter to which

we will direct our attention at a later stage, e.g., in connection with any formal requests of the carriers for appropriate rate increases.

9. Our desire for an expedited hearing is based on the need to reach a fair and prompt resolution of this matter. While the allegations of WU do not support the grant of the interim relief requested, we believe they support a finding that the due and timely execution of our functions imperatively and unavoidably require expedition. It is our intent that the hearing be conducted with reasonable dispatch and that the Administrative Law Judge designed to preside at the hearing promptly prepare an initial decision at the earliest opportunity. Further, we believe it desirable that the Trial Staff of the Common Carrier Bureau be separated from both the Commission and the Administrative Law Judge (see 32 FCC 2d at p. 90).

Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 222 and 403 of the Communications Act of 1934, as amended, that the original and amended complaint and petition filed by The Western Union Telegraph Company in the above-captioned proceeding is hereby DESIGNATED FOR HEARING, at the Commission's offices in Washington, D.C., at a time and upon issues to be specified by further order.

IT IS FURTHER ORDERED, that the presiding Administrative Law Judge shall, upon the closing of the record, promptly prepare an initial decision which shall be subject to exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282 and that the Trial Staff of the Common Carrier Bureau be separated both from the Commission and the Administrative Law Judge.

IT IS FURTHER ORDERED, that The Western Union Telegraph Company, ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation, Western Union International, Inc., and the Trial Staff of the Common Carrier Bureau are made parties to the hearing.

IT IS FURTHER ORDERED, that the Commission will issue such orders herein as may be necessary or appropriate.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1058

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re JACKSONVILLE CABLE TV CO., JACKSONVILLE, ILL. For Waiver of Section 74.1103 of the Commission's Rules	SR-5698N-R SR-5698N-S

MEMORANDUM OPINION AND ORDER

(Adopted October 11, 1973; Released October 17, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT

1. Jacksonville Cable TV Company operates a cable television system at Jacksonville, Illinois, in the Springfield-Decatur-Champaign-Jacksonville Market (#64) where Television Broadcast Translator Station W75AK is located. In 1969, Lee Enterprises, Inc., licensee of Station KHQA-TV, (CBS, Ch. 7), Hannibal, Missouri, and of Translator Station W75AK (which carries programming from Station KHQA-TV), asked Jacksonville Cable to give the Translator Station program exclusivity pursuant to former Section 74.1103(e) of the Commission's Rules.[1] Jacksonville Cable responded by filing a petition for waiver, which the Commission denied in *Jacksonville Cable TV Company*, F.C.C. 70-1283, 26 F.C.C. 2d 721. On January 13, 1971, Jacksonville Cable filed a "Motion for Stay" directed against the cited action, and a letter urging the Commission to reconsider its decision.

2. According to Jacksonville Cable, one of the factors that the Commission should carefully consider is the possible impact that the Translator Station's program exclusivity might have upon the viability of a new Jacksonville station, not affiliated with CBS, WJJY-TV. However, on September 21, 1971, Station WJJY-TV went dark and, as we noted in our cited decision, although the station's licensee was served copies of pleadings in this proceeding, it has not attempted either to participate in it, or to support Jacksonville Cable's position.

3. Jacksonville Cable devotes the remainder of its pleadings to repeating, in chronological order, the arguments it raised originally in its requests for waiver, which it claims the Commission "perfunctorily dismissed." We reject this claim. We have previously considered Jacksonville Cable's arguments as fully as we felt necessary, and we see no need to repeat our discussions and rulings.

In view of the foregoing, the Commission finds that reconsideration of its action in *Jacksonville Cable TV Company*, FCC 70-1283, 26 FCC 2d 721, would not be consistent with the public interest.

[1] Comparable provisions are now contained in Section 76.91 of the Rules.

Accordingly, IT IS ORDERED, That the "Motion for Stay" and the letter request for reconsideration of its action in *Jacksonville Cable TV Company*, FCC 70–1283, 26 FCC 2d 721, filed January 13, 1971, by Jacksonville Cable TV Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-1062

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MIDNIGHT SUN BROADCASTERS, INC., JUNEAU, ALASKA For Construction of a Joint Tower for Stations KINY-TV and KINY (AM)	BPCT-4637 and BP-19,481

OCTOBER 11, 1973.

Mr. STEPHEN M. SIMS,
Rural Route 3, Box 3607,
Juneau, Alaska.

DEAR MR. SIMS: This refers to your objections to a grant of the pending applications of Midnight Sun Broadcasters, Inc., BPCT-4637 and BP-19,481, proposing the construction of a joint tower for stations KINY-TV and KINY (AM), on tideland property located on Douglas Island across the Gastineua Channel from Juneau, and your request for the issuance of an Environmental Impact Statement by this Commission.

Your objections raise questions concerning whether the proposed tower would constitute proper land use, a hazard to air navigation, a hazard to bald eagles, and aesthetic pollution. Moreover, you assert that there are alternate sites available which would serve the needs of Midnight Sun Broadcasters, Inc., without the mentioned disabilities.

After careful consideration of all the matters raised in your objections, including all the decisions of the various federal, state and local authorities who were required to pass upon the proposed site, we find that you have failed to make the threshold showing that the proposed tower would have significant affect upon the quality of the human environment, and, therefore, no Environmental Impact Statement is required. In making this determination the Commission also notes that each of your allegations was considered by the various authorities and ultimately rejected. The FAA found no hazard, the various zoning authorities found no improper land use, and the Fish and Wildlife Service found no permanent disturbance to the eagles' feeding station, and that the species mentioned were not on the endangered list. Moreover, Midnight Sun Broadcasters, Inc., submitted evidence which indicated that the alternate sites you mentioned were either not available, or would not be adequate for the proposed service.

Accordingly, the Commission has this day granted the applications. BPCT-4637 and BP-19,481, of Midnight Sun Broadcasters, Inc., and your objections ARE DENIED.

Commissioner Robert E. Lee was absent. Commissioner Johnson dissenting and issuing a statement.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

DISSENTING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

Texas may still be the largest non-glacial state in the Union, but Alaska does boast some 586,412 square miles, 319,074 more than Texas. And yet, this Commission is unable to find a suitable antenna tower location anywhere in the state of Alaska that can serve Juneau and still not adversely affect that city's environment or the safety of its citizens.

The Commission firmly concludes that the environment (both physical and aesthetic) will not be damaged by KINY's antenna tower. The majority also dismisses possible safety problems surrounding KINY's increase in tower height at a time when the recent television tower tragedy at Cedar Rapids, Iowa, is still in our minds. That 2,000-foot tower of KCRG–TV took the lives of three persons when it fell. In my judgment, the Commission should not be passing on these issues without the benefit of at least *some* policy guidelines on environmental impact.

Objections have been raised by Mr. Stephen M. Sims, who alleges that for the following reasons the public interest will not be served by this tower move:

1. The location of the tower in a residential area will change the character of the property and depreciate home values;

2. High winds common to the area raise the possibility that the tower could fall and destroy Mr. Sims's home or endanger his family and neighbors;

3. The proposed site location, the Gastineau Channel, is a prominent landmark for visual flights, and a tower extending 950 feet above average terrain would create a sizable air hazard;

4. In the water close to the site are six pilings which are used daily as a resting and feeding place for bald eagles, and the proposed tower move would permanently alter the life styles of this endangered species; and

5. Available alternative sites would equally serve the licensee's needs.

The majority has told Mr. Sims that his allegations:

> ". . . have failed to make the threshold showing that the proposed tower would have significant affect [sic] upon the quality of the human environment."

Such a conclusion cries out for some reasonable support—which the majority fails to supply. The staff provides a similar whitewash by first stating that a threshold showing must be made and then—after pointing to various national, state, and local authorities' approval of the tower move—concluding that Mr. Sims failed to meet *his* burden. Such a standard is unreasonably vague, meaningless for future cases, and unconscionably shifts the burden of proof from the applicant to a "friend of the court" who is trying to do what the Commission either cannot or will not do.

The majority points approvingly to a variety of prior federal, state, and local decisions regarding this tower move but fails to provide Mr. Sims or the public with any evidence of its own investigation into the matter. Has there been any? The staff and the majority are curiously silent on this point.

In a broader sense, today's decision illustrates the direction and philosophy of this Commission. If Alaska could be said to have a "media baron," Midnight Sun Broadcasters, Inc., is it. Midnight Sun is the licensee of Juneau's only TV station and one of its two standard broadcast stations. Midnight Sun is the licensee of three of Alaska's seven television stations and four of its 20 standard broadcast stations. It also owns cable interests. Could it be that a lesser broadcaster might have had more difficulty with such a proposal?

I dissent.

F.C.C. 73R-290

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BILLY D. PIRTLE, CLEVELAND, TEX.	Docket No. 19577 File No. BP-19126
JESSIE C. HOWARD, CLEVELAND, TEX. For Construction Permits	Docket No. 19579 File No. BP-19154

APPEARANCES

George R. Borsari, Jr., *Leonard S. Joyce*, and *Leo George*, on behalf of Billy D. Pirtle; *Martin R. Leader*, on behalf of Jessie C. Howard.

DECISION

(Adopted August 13, 1973; Released August 17, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. The sole issue in this proceeding is to decide which of two mutually exclusive applications for a new AM broadcast station in Cleveland, Texas, would better serve the public interest. The applications of Billy D. Pirtle and Jessie C. Howard were designated for hearing by Commission Order FCC 72-764, released September 7, 1972, 37 FR 18649, published September 14, 1972. Administrative Law Judge Forest L. McClenning presided over the hearing and released his Initial Decision, FCC 73D-20, on May 3, 1973. In that decision the Presiding Judge preferred the application of Howard under the standard comparative issue since that applicant would, in the Judge's view, better achieve both of the primary objectives, *i.e.* diversification of mass media of communications and best practicable service to the public, set forth by the Commission in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). A panel of the Review Board heard oral argument in this proceeding at the request of Pirtle who excepted to the Judge's disposition of the matter. The Review Board has considered the Initial Decision and the record in this proceeding in light of the exceptions and oral argument and is satisfied that, except as modified herein and by our rulings on the exceptions contained in the attached appendix, the findings of fact fairly reflect the record and fully support the ultimate conclusion reached by the Judge. However, since certain of Pirtle's exceptions challenge a basic evidentiary ruling and question the Judge's comparative evaluation of the applicants, the Board's position on these matters will be set forth below.

DIVERSIFICATION OF MEDIA OF MASS COMMUNICATION

2. As already noted, the *Policy Statement*, *supra*, sets forth diversification of mass media of communications as one of the two primary objectives to be considered in the comparative evaluation of applicants for construction permits. We cannot agree with Pirtle's contention that the preference to be accorded Howard in this respect is of only minor significance. Pirtle is president of and owns 90% of the stock in Terrell Broadcast Corporation, the licensee of Station KTER, a 250 watt, daytime only station at Terrell, Texas, a city of 14,182,[1] more than twice the size of Cleveland, Texas. Terrell is located approximately 180 miles northwest of Cleveland, population, 5,627. While there is no overlap of service contours, Howard, who owns no media of mass communications, must nevertheless be accorded a substantial preference over Pirtle who will continue to be the president and 90% owner of KTER. The objective described by the *Policy Statement*, *supra*, is not confined to prevention of concentration of control in a given community, but rather seeks the broader goal of diversification of ownership of mass media of communications wherever it may be located.[2] While the facts that the Terrell operation is daytime only and the interference free service area is relatively small may prove decisive in a situation where we must compare two applicants, each of which owns some media of mass communication, that is not the case before us for Howard has no such ownership interest. Consequently, Howard must receive a substantial preference.

BEST PRACTICABLE SERVICE TO THE PUBLIC

3. The second major objective sought to be achieved by the *Policy Statement*, *supra*, is the best practicable service to the public. There are many factors to consider in this area of comparison but the most significant in this case is integration of ownership into the day-to-day management of the station. Pirtle testified that he would leave the operation of his Terrell station to a manager and that he would personally move to Cleveland and devote over 40 hours per week to the operation of the proposed station. The Presiding Judge so found, but concluded that "no public benefit can be found in the proposal of Mr. Pirtle to deprive the existing operation of Station KTER of the benefits of his full-time integration into that operation to enable him to bring the benefits of such integration to the new proposal." The Board, however, agrees with Pirtle that this conclusion is contrary to the position set forth in *Pleasant Broadcasting Company*, 40 FCC 2d 582, 27 RR 2d 264 (1973). In that case, as in this, one of the principals of the licensee of an existing station proposed to leave the operation of the existing station in order to personally manage the proposed station. We did not penalize the applicant in that case and we will not do so here. To refuse to consider proposed integration merely because the principal is already integrated into the operation of a different station would, in our view, unfairly restrict the activities of persons

[1] All population figures are from the 1970 U.S. Census.
[2] *Snake River Valley Television, Inc.*, 26 FCC 2d 380, 385, 20 RR 2d 644 (1970), review denied FCC 71-549, released May 26, 1971.

engaged in broadcasting. Such a policy would, in addition, result in a double penalty for station ownership, since such ownership is held against an applicant under the diversification criterion. Moreover, the policy urged by Howard would not necessarily benefit the public because it might provide an incentive for nonparticipation in station operation by owners who contemplate applying for other stations.[3] Finally, although we will accord credit to Pirtle for full-time integration, that credit must be diminished to a minor extent because of his divided duties and responsibilities for both his existing station and his proposed Cleveland station. See *Pleasant Broadcasting Company, supra.*

4. One of the major areas of disagreement in the proceeding stems from Howard's showing of integration into his proposed station. In response to question 27 in Part IV–A of Form 301 which reads as follows:

> State the name(s) and position of the person(s) who determine(s) the day-to-day programming, makes decisions, and directs the operation of the station covered by this application and whether he is employed full-time in the operation of the station.

Howard wrote "Jessie C. Howard, Owner. Gled[n] Dodson, General Manager, employed full time." At the hearing Howard stated at page 2 of his Exhibit 1:

> If I receive a construction permit for the former facilities of Radio Station KVLB, Cleveland, Texas, I intend to devote my full time to my licensee responsibility and will be solely responsible for the day-to-day supervision of the station.

Upon the objection of counsel for Pirtle, who contended that this language varied from Howard's response to Question 27 quoted above, the Presiding Judge struck the language from Howard's Exhibit 1. Counsel based his argument on the contention that since Howard failed to specify that he would devote full time to the station while at the same time specifically stating that his general manager would be "employed full time" it must be concluded that Howard did not intend to devote full time to the proposed station. Counsel further requested the Judge to take official notice of identical language in Howard's renewal application for Stations KTXJ and KTXJ–FM, Jasper, Texas (stations formerly owned by Howard) which were filed after Howard had returned from Jasper to Shepherd, Texas. This, counsel argued, further supported his contention that Howard clearly did not intend to devote full time to his proposed station at the time he filed his application for a new station at Cleveland, Texas. Howard contended at the hearing, and again in his reply brief, that, while the language in his application was not entirely clear, he was entitled to clarify it by his testimony at the hearing. The stricken evidence was left in the record as an offer of proof. The Judge also precluded Howard from testifying as to how many hours per week he would devote to the affairs of the station, but, over the objection of counsel for Pirtle, permitted Howard to testify that as owner of the station: he

[3] We note, however, that if a situation arises where an applicant receives a grant based in part on a promise of owner participation and within a short time thereafter makes a similar promise in order to obtain another grant, a different result might be warranted.

will regulate the hours that people will work, all the commercial material, and do the hiring and firing, with help of the general manager. He further testified that the general manager would mostly keep up the equipment and when he (Howard) was not there, the manager would take over.

5. While the question of whether Howard's testimony constitutes a variance from the statement contained in his application is close, the Board will not overrule the decision of the Presiding Judge; his ruling is tenable and, in the absence of a clearly arbitrary or erroneous evidentiary ruling by the Presiding Judge, the Board will not substitute its judgment for his. By the same token, the Board will affirm the Judge's rulings which permitted Howard to testify concerning his participation in the proposed station. We do not find, as contended by Pirtle, that this testimony is at variance with the application or that the Judge's ruling was arbitrary or clearly erroneous. While we will accord Pirtle credit for his participation in the operation of his proposed station, that credit is to some extent diminished by his obligation to Station KTER. On the other hand, while we cannot, based on the record before us, conclude that Howard should be accorded full credit for day-to-day participation in the affairs of the proposed station, we conclude, as did the Presiding Judge, that in light of the duties which he will perform at the station, Howard must be accorded substantial credit for his integration into the proposed station. The Board is in full accord with the Presiding Judge's treatment of the various other factors, including Pirtle's past broadcast record and the various qualitative aspects, such as experience and local residence, which must be evaluated in determining which applicant would provide the "best practicable service to the public." Thus, Pirtle is entitled to credit for 100 percent full time integration, diminished to a limited extent by his continuing duties at Station KTER, and Howard for 100 percent integration on a somewhat less than full-time basis. The duties to be performed by both owners are meaningful and significant, and the proposals of both are enhanced by experience and civic participation. On balance, therefore, the Board believes that Pirtle is entitled to a slight preference over his opponent in this area of comparison. However, in light of the clear and substantial preference to which Howard is entitled under the diversification criterion, the Board is of the view that a grant of his application would better serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED, That the application of Billy D. Pirtle for a new standard broadcast station at Cleveland, Texas, BP-19126, IS DENIED; and

7. IT IS FURTHER ORDERED, That the application of Jessie C. Howard for a new standard broadcast station at Cleveland, Texas, BP-19154, IS GRANTED.

DEE W. PINCOCK,
Member, Review Board,
Federal Communications Commission.

APPENDIX

Rulings on Exceptions of Billie D. Pirtle

Exception No.	*Ruling*
1	Denied. See paragraph 5 of this Decision.
2	Granted to the extent indicated in paragraph 2, denied in all other respects.
4, 5	Denied as being of no decisional significance.
3	Granted. The facts that Cleveland is in Liberty County, that Mr. Howard's home address is Shepherd, Texas and that his home is approximately 15 road miles from Cleveland, Texas are established on the record.
6	Denied. Pirtle's showing of awards to his Terrell station does not meet the *criteria* for establishing an "unusually good" past broadcast record. He submitted no program descriptions, weekly schedules or percentage breakdowns which would enable the Board to determine that, despite his citations for rule violations, his operating record shows "unusual attention to the public's needs and interest, such as special sensitivity to the area's changing needs through flexibility of local programs designed to meet those needs", *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. 398, 5 RR 2d 1901 (1965). See also *Triple C. Broadcasting Corporation*, 16 FCC 2d 357, 15 RR 2d 515 (1969).
7, 9	Granted to the extent indicated in paragraph 4 of this Decision.
8	Denied. See paragraph 5 of this Decision.
10	Denied for the reasons set forth in paragraph 2 of this Decision.
11	Denied for the reasons stated in the whole of this Decision.

F.C.C. 73D–20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BILLY D. PIRTLE, CLEVELAND, TEX.	Docket No. 19577 File No. BP–19126
JESSIE C. HOWARD, CLEVELAND, TEX. For Construction Permits	Docket No. 19579 File No. BP–19154

APPEARANCES

George R. Borsari, Jr. and *Leonard S. Joyce* (Daly, Joyce and Borsari) on behalf of Billy D. Pirtle; *William H. Fitz* (Pierson, Ball & Dowd) on behalf of Texan Broadcasting Co., Inc.; *Martin R. Leader* (Fisher, Wayland, Southmayd and Cooper) on behalf of Jessie C. Howard; and *Henry L. Baumann* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FOREST L. MCCLENNING

(Issued April 27, 1973; Released May 3, 1973)

PRELIMINARY STATEMENT

1. By order released September 7, 1972, pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications were designated for hearing in a consolidated proceeding.[1] Each seeks a construction permit for a new standard broadcast station to operate on the frequency 1410 kHz, with 500 watts power, unlimited time employing a directional antenna (DA–2), the deleted facilities of Station KVLB Cleveland, Texas. The order of designation, except as indicated by the specified issues, found each applicant qualified to construct and operate as proposed, but that the applications are mutually exclusive. Hearing was ordered on the following issues:

1. To determine with respect to the application of Texan Broadcasting Co., Inc.;

(a) Whether the Cleveland Bank and Trust Company, or any other lending institution, is willing to loan the applicant the amount it proposes to use for the first three months' construction and operating costs.

(b) Whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

[1] The application of Texan Broadcasting Co., Inc. seeking the same facilities was also designated for hearing in this proceeding. By order released January 15, 1973 the request of Texan Broadcasting Co., Inc. for dismissal of its application was granted.

2. A prehearing conference was held October 3, 1972 and hearing was held January 17, 1973, with the record being closed on that date. Proposed findings of fact and conclusions of law were filed by the applicants March 16, 1973 and reply findings being filed April 6, 1973.

FINDINGS OF FACT

3. *Billy D. Pirtle* was born October 3, 1932 in Malakoff, Texas. In 1953 between college terms he was employed as a salesman at Station KLTI Longview, Texas. Upon graduation from East Texas University in 1954 he was employed at Station KBUD Athens, Texas as a salesman-announcer, then by Station KRUN Badger, Texas as a salesman-announcer and in the latter part of 1954 as a salesman-announcer at Station KTER Terrell, Texas. In the spring of 1956 he returned to Station KLTI as its commercial manager and remained there until February of 1959 when he returned to Station KTER as station manager. He has held a first-class radiotelephone operator license since 1957.

4. In 1959 Mr. Pirtle's father purchased controlling interest of Terrell Broadcast Corporation, the licensee of Station KTER and Billy D. Pirtle then became general manager of the station and vice-president of the licensee corporation. In September of 1968 he purchased his father's interest, 1350 of 1500 shares issued and outstanding and since that time has been general manager of the station and president of the licensee corporation. He devotes full time to the day-to-day management and operation of Station KTER, approximately 30 hours per week at the station with the balance of his time being spent in public relations work in behalf of the station. Station KTER operates on the facilities 1570 kHz, 250 watts power, daytime only. Terrell, Texas is located approximately 180 miles northwest of Cleveland, Texas.

5. While working in Longview, Texas Mr. Pirtle was a member of the Junior Chamber of Commerce and of the Civitan Club. While in Athens, Texas he was active in the Boy Scouts of America. In Terrell, Texas Mr. Pirtle is Chairman of the local American Red Cross Chapter; a member and past director of the Rotary Club, a member of the Terrell Independent School District School Board and past member of its Local Educational Committee; a member of the City Board of Commendation; past vice-president and currently a member of the Christian Businessmen Committee of Terrell; past director of the Terrell United Fund; a committee member to select the Citizen of the Year in Terrell; and a past member of the Terrell Jaycees. Mr. Pirtle is also a member of the Board of Development For the East Texas Baptist College which is located in Marshall, Texas. This college serves geographically, East Texas including Cleveland, Texas.

6. In the years 1963 and 1964 Station KTER received from the Texas Association of Broadcasters the award of being the best small market local newscaster in the State of Texas. In 1970 it was one of five stations receiving the Abe Lincoln Award from the Southern Baptist Television and Radio Committee for public service. It was one of two small market stations receiving this award. In 1971 the station received the Terrell High School Vocational Instructional Public

Appreciation Award and in 1972 the Jaycees Appreciation Award. In 1968 the station received the Favorite Citizens Award from the Business and Professional Women's Club of Terrell.

7. The application for renewal of license of Station KTER which was due to be filed on or before May 3, 1968 was not filed until May 29, 1968 for which by letter of the Chief, Complaints and Compliance Division dated September 12, 1968 a Notice of Apparent Liability in the amount of $100 was issued. At this time Billy D. Pirtle's father, Orval Pirtle, held controlling interest in and was president of the licensee corporation. In response the licensee stated the failure to timely file was due to the illness of Orval Pirtle and the Commission's delay in responding to licensee's request for additional forms. By order released November 12, 1969 the Commission ruled that these did not evidence extraordinary, mitigating circumstances and ordered a forfeiture of $100 be paid. The forfeiture was paid following the sending of a telegram on March 12, 1970 stating "Non-payment may result in referral of matter to Justice Department for recovery action."

8. September 12, 1969 an official notice of violation was issued to Station KTER involving ten charged violations including failure to have equipment performance measurements available. Equipment performance measurements made September 25, 1969 and submitted April 14, 1970 were incomplete and by letter dated May 4, 1970 this was called to the licensee's attention together with a form outlining the information required. A reply within twenty days to this letter was requested. By letter of the Chief, Complaints and Compliance Division, dated July 10, 1970 the licensee's attention was directed to its failure to respond to this letter. A response was thereafter made and all violations cleared. These violations followed the moving of the Station KTER studios during which some station materials had been destroyed.

9. In the event of grant of his application Mr. Pirtle would move to Cleveland, Texas and devote full time to the day-to-day operations of his proposed station. He would appoint Mr. Dean Tiller, an employee of Station KTER since 1950, general manager of that station. He is presently Mr. Pirtle's assistant, sales manager and handles a portion of the news department. Mr. Tiller holds a first-class radiotelephone operator license. He has agreed to accept the position. As general manager he would have authority to control the programming of Station KTER within established general policies and to write checks to the full limit of the station's account including necessary equipment replacements. Mr. Pirtle would consult with Mr. Tiller by telephone as often as necessary and would make a trip to Terrell on weekends approximately once a month or as often as is necessary. Written reports would be submitted to him by Mr. Tiller "as needed."

10. *Jessie C. Howard* was born in 1921 in Gladsdale, Texas which is located three miles south of Cleveland, Texas. In 1930 he moved to San Jacinto County a border of which lies approximately 1½ miles to the north of Cleveland. He presently resides in that county at a point approximately halfway between Shepherd and Cleveland, Texas which are separated by a distance of twelve miles. His only absences from San Jacinto County since moving there have been during his military service in World War II and from 1962 to March of 1971.

11. In March of 1959 Mr. Howard bought a 37% interest in standard broadcast Station KTXJ Jasper, Texas and in June of 1961 he purchased a 100% interest in that station. In 1962 he moved to Jasper and devoted full time to the operation and management of Station KTXJ. In April of 1964 he received a construction permit for Station KTXJ–FM and placed that station on the air in August of 1965. In June of 1971 he sold Stations KTXJ and KTXJ–FM, having returned to San Jacinto County approximately 90 days earlier. He opened a marine supply company in Shepherd, Texas which is the franchised dealer for Chrysler outboard engines and boats. At the time of hearing he had entered into a contract for sale of this business which was subject to the approval of Chrysler Corporation for transfer of the franchise. In the event of grant of his application he would employ a general manager of the station who would be responsible for the technical operation subject to Mr. Howard's direction. Mr. Howard would be in charge of programming, business and community relations.[2]

12. Prior to moving to Jasper, Texas in 1962 Mr. Howard helped organize the Shepherd, Texas Volunteer Fire Department and served as its Chief from 1957 to 1960. During this period he was also a member of the Cleveland Chamber of Commerce and of the Shepherd Chamber of Commerce. While a resident of Jasper, Texas he was a member of the Jasper Chamber of Commerce and served on its Board of Directors for three years. Since his return to San Jacinto County he has again become a member of the Cleveland Chamber of Commerce and has an application pending for membership in the Rotary Club of Cleveland.

CONCLUSIONS

13. The *Policy Statement on Comparative Broadcast Hearings* 1 FCC 2d 393, 5 RR 2d 1901 sets forth the two primary objectives toward which the process of comparison herein is to be directed as being "first, the best practicable service to the public and second, a maximum diffusion of control of the media of mass communications." The elements deemed relevant to assessing which of the applicants it is more probable will bring the best practicable service to the public include participation in station operation by owners with the primary interest being in full-time participation. In assessing this element, the position which the participating owners will occupy in relation to policy and management functions is accorded "particular weight." Attributes enhancing such participation include broadcast experience and local residence in combination with participation in civic affairs or other local residence background.

14. In the comparative assessment here to be made, Billy D. Pirtle does propose full-time participation in operation of the proposed station and brings to those duties approximately 20 years' experience in broadcasting including more than ten years' experience in station management. He also would become a resident of Cleveland, has a record of participation in civic activities in the various communities in which he has resided and proposes to continue such participation in Cleveland. Under his management Station KTER has received public recognition

[2] For the reasons stated in the record, objection was sustained to the testimony of Mr. Howard that he would devote full time to these duties.

through the various awards reflected in paragraph 6, *supra*. This, however, is not a showing demonstrating an unusually good past broadcast record. Moreover, its record is marred by the failures to comply fully with the requirements of the Commission's Rules noted in paragraphs 7 and 8, *supra*. And Mr. Pirtle's integration showing would be achieved by his removal from the helm of Station KTER to assume the duties of management of his proposed station. His position and duties at Station KTER would be taken over by one having no ownership interest and holding no office in the licensee corporation with Mr. Pirtle thereafter giving only nominal attention to that station's operations. Thus his showing of 100% full-time integration in the proposed operation would be achieved at the expense of depriving Station KTER of the full-time integration of its 90% stockholder and president. The significance attached to such integration is the "likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. . . . It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership." *Policy Statement on Comparative Broadcast Hearings*, *supra*. The Policy Statement makes no distinction between new proposals and existing operations and none is self-evident.

15. Jessie C. Howard has resided for a number of years in the immediate area of the proposed station, shows some participation in Cleveland civic activities and has ten years of experience in the ownership and day-to-day operation of aural broadcast facilities. Though a general manager of the station would be employed, Mr. Howard's integration covers the areas of programming, business relations and community relations. Viewed comparatively, it is concluded that Mr. Howard's showing as to which proposal would bring the best practicable service to the public and his showing in the diversification factor are superior to those of Mr. Pirtle. No public benefit can be found in the proposal of Mr. Pirtle to deprive the existing operation of Station KTER of the benefits of his full-time integration into that operation to enable him to bring the benefits of such integration to his new proposal. The proposed integration of Mr. Howard in light of the duties to be performed and under the circumstances here present entitles him to a preference in this comparative area. Mr. Howard is not presently associated with any media of mass communications in contrast to the 90% ownership of Station KTER by Mr. Pirtle. This necessarily accords him a preference in this comparative area. It, therefore, is concluded that the public interest would be better served by grant of the application of Jessie C. Howard than by grant of the application of Billy D. Pirtle.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Jessie C. Howard is granted and the application of Billy D. Pirtle is denied.

FOREST L. MCCLENNING,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 73-1039

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION FOR RULEMAKING TO REQUIRE BROADCAST LICENSEES TO MAINTAIN CERTAIN PROGRAM RECORDS	Docket No. 19667 RM-1475

MEMORANDUM OPINION AND ORDER

(Adopted October 3, 1973; Released October 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it the various filings in response to our Notice of Proposed Rule Making in this proceeding. Based on a review of these filings the Commission has reached certain determinations which are discussed in the succeeding paragraphs.

2. The Notice in question invited comments on a proposal to open the program logs of radio and television stations to public inspections and to lengthen the retention period for the logs from the present two years. A large number of parties have filed comments on the various aspects of the proceeding. Broadcasters have written at length about problems that they believe public inspection and a longer retention period could entail and the petitioner National Citizens Committee for Broadcasting, and others supporting the proposal have also written at length about the gains they see flowing from such steps. Resolution of these conflicting claims involves consideration of a large number of issues. Some of these issues go beyond the parameters of this proceeding and relate to other major subjects before the Commission. As a consequence, there is a need to coordinate our action here with that to be taken as part of our consideration of these other on-going matters. One of these is the effort, now underway, of the task force on re-regulation to revise and improve the regulations pertaining to the operation of broadcast stations, including the removal of unnecessary and outdated requirements. The subject of radio regulation has been of particular concern in this effort. To insist upon action on radio and television together in this proceeding is to delay action on both, as there is a clear need to coordinate any step contemplated in regard to radio. On the other hand, action regarding television need not await such re-regulatory coordination. Thus, we have decided to defer action on the part of the proceeding dealing with radio and in the discussion which follows, the reference is entirely to television. Depending on what develops based on our experience in the television area, we will be in a better position to evaluate any possible action in regard to radio, as well as to better coordinate it with current re-regulatory

efforts. Likewise, we intend to defer consideration of a change in the log retention period. This, too, is an area where the benefit of experience is needed before action is taken.

3. Another matter pertinent to this proceeding is the renewal proceeding in Docket No. 19153. On May 4, we released our Interim Report and Order, indicating that a final Report and Order would be issued after review of the new renewal forms by the Office of Management and Budget. That process has been completed and a final Report and Order has been issued. As a part of that action, we required television stations to file an annual report based on their programming in a composite week in each year of the license term. The logs of the stations are used for this purpose, much as they had always been used in the preparation of renewal applications. The composite week program logs filed with renewal applications have been available to the public. On essentially the same rationale, we have concluded that the logs for the annual composite weeks should also be made public and this step was taken in the Report and Order in Docket No. 19153. Consequently, that matter is not at issue here. What is at issue is whether additional steps should be taken.

4. Based on our consideration of the submissions in this proceeding we have concluded that television program logs for times other than the composite week should be made public under certain circumstances. We have some tentative views as to the circumstances under which there should be public inspection and the procedural safeguards which are required to avoid the possibility of abuse and the imposition of unnecessary burdens. However, these are tentative views. To help us reach a final resolution of these points, we believe that the holding of oral argument would be useful. This oral argument is not intended to cover the entire range of issues in the proceeding. Rather, it is specifically limited to the issues which we will set forth below. Even on these issues, the pleadings provided a record upon which we could base our action. However, we think it desirable to hold oral argument because it would allow a precise focusing of attention on what have become the central points to be resolved.

5. We will first discuss the substantive questions relating to disclosure and then deal with the procedural safeguards. Under our old renewal policies as well as new procedures, a licensee could supplement the showing which was derived from the composite week if he thought it did not adequately and accurately depict the station's performance. If this is done, the licensee can choose any period to use for the purpose, but the public has no opportunity to gain access to the logs for any other period on which to base a possible rebuttal. When a party relies upon material in its possession to support its arguments, fairness suggests that those of a contrary view have access to that material for rebuttal purposes. When a licensee chooses to supplement its composite week showing, we are inclined toward making all the logs available (under circumstances described below) so that the issues can be properly joined on a fair and equitable basis.

6. We also need to consider what to do when a licensee has not gone beyond its composite week showing. We are considering the following approach. Initially, those interested in viewing program logs would apply to the station to do so, indicating the basis for the request. If a

prima facie case has been made—in other words, a good cause showing—of the merits of the request we would expect the request to be honored. If a dispute should arise, regarding the merits of the request the matter then could be brought to the Commission's attention by the filing of a petition, hopefully a process which will not often be necessary. In addition to its other possible advantages, the net result of following this approach would be to avoid imposing any burden whatever on the broadcaster who receives no requests. Since we do not now contemplate a lengthening of the retention period, stations not receiving these requests would be in exactly the same practical position as they are now. For those receiving requests, we are considering the following procedural requirements which should discourage frivolous or nuisance requests and avoid the imposition of unfair burdens:

(a) All requests must be made in advance and shall be subject to the scheduling of a mutually convenient appointment time;
(b) All copying or duplication is to be done at a location chosen by the station, with all necessary costs to be borne by the party wishing to view the logs; and
(c) No logs, except for composite weeks shall be available for inspection until a minimum of 30 days have elapsed from the day of broadcast.

7. We believe that the appointment approach will avoid the disruption that would attend unannounced and unscheduled visits and yet will respond to the legitimate needs of those wishing to inspect. Since the costs of duplication can be considerable, it seems only proper to require that it be assumed by the benefitting party. The 30-day delay is intended to accomplish two things. It would avoid the disruption that could result from inspection when the logs are still being used for billing or other station purposes, and it would help insure that competitors would not have access to timely information which could be used to gain some competitive advantage. Since the public groups are presumably concerned with a licensee's ongoing efforts, the resulting delay should cause them little inconvenience.

8. Parties at oral argument are invited to address any or all of the above points. However, since the good cause request procedures set forth above have not been previously discussed it would be most helpful if the parties gave this area particular attention in their presentations.

9. Oral argument is scheduled for November 20, 1973. Parties wishing to be heard on the above questions should communicate their desire to the Commission in writing no later than October 26, 1973. These requests (original and four copies) should be addressed to the Commission's Broadcast Bureau, attention: Rules and Standards Division. Parties should indicate in their request how much time they desire. Interested parties having parallel views to express are encouraged to join together in a single appearance and thus avoid unnecessary duplication in the arguments. Because time is limited it may not be possible to accommodate all parties in the amount of time requested but recognition will be given to the time requirements of parties participating jointly. After receipt of all the requests, the Commission will issue an Order setting forth who will appear on whose behalf, and when and for what period they will appear. After Oral Argument, the Commission expects to take these matters under advisement and to issue a First Report and Order as promptly as circumstances permit.

10. Accordingly, IT IS ORDERED, That Oral Argument is scheduled as described above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

STATEMENT OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

I welcome the action we have taken today and believe it ultimately will prove beneficial to the Commission, to broadcasters and to the public. Since we have scheduled oral argument on our proposals, and since I do have some reservations about our opinion, I think it might be helpful to set forth my thoughts at this time.

In my view, the primary purpose for making logs available is to provide the public with the detailed, factual information needed to make objective evaluations of a station's past program performance. Without the logs, the public has only two ways of making such an analysis. It can either rely upon information garnered from a monitoring study conducted by some local, volunteer, community group, or it can attempt to analyze the licensee's own summary evaluation of its program performance that is contained in the renewal application. For a variety of reasons, neither of these alternatives provides adequate factual detail for formulating comprehensive, objective evaluations of program performance. Accordingly, public access to station logs will be in *everyone's* interest.

For the broadcaster who has done his job and lived up to Commission rules and regulations, program logs constitute the best evidence of performance. Thus, public evaluation of programming based on the licensee's own records will reduce the incidents of allegations based on speculation, generalization and subjectivity. Moreover, if the licensee disagrees with the public analysis of his logs, he will have specific facts and figures, not mere rhetoric, to which to respond and oppose.

For the public, log availability is simply a matter of fairness. It provides access to information upon which licensees base supplements to their composite week showing. Access to logs will enable the public to frame more substantive complaints based upon factual information. Unlike many businesses, there is, by definition, nothing secret about broadcasting. The logs are simply a permanent record of what the broadcaster has sent out over the airwaves in the hopes it will be seen or heard by the largest number of people possible. The logs are created and retained by the broadcaster. To forbid the public to see this summary record of what was, in the first instance, a public act is most difficult, if not impossible, to justify.

The staff of our Broadcast Bureau and the Commission will also benefit. Since issues and arguments based upon information culled from the logs will be more sharply defined, more objectively presented, and more factually complete, the staff will have better records from which to evaluate the merits of pleadings. The Commissioners, in turn, will have more objective staff analyses upon which to base their final decisions.

Although it appears that all parties stand to gain, some broadcasters have expressed concern that the sheer volume of paper involved could make requests for logs burdensome to them in a number of ways. We must be fair about this to the broadcasters as well as the public. They cannot be confronted with hoards of people wandering through their files at all hours of the day and night. In framing our final rules, I believe we should establish reasonable time and space guidelines which both minimize potential burdens on licensees as well as accommodate the interests of the public. We have successfully adopted adequate guidelines for the availability of stations' public files (47 C.F.R. § 1.526); *In Re Availability of Locally Maintained Records for Inspection of Members of the Public*, 28 F.C.C. 2d 71 (1971). I see no reason why we cannot do the same for all program logs.[1]

I recognize that no set of rules will erase all burdens for all parties. However, it does not follow that because *some* burdens may be imposed, logs should not be made available. If, as I have discussed above, the purpose for providing access is to promote objective evaluation of station program performance, and if this will serve the interests of the Commission, broadcasters and the public, then any potential burdens are vastly outweighed by considerations of administrative efficiency, fairness, and the public interest.

Accordingly, I do not think the Commission should concern itself with developing standards for determining what constitutes a "good cause request" for program logs. So long as time and space guidelines are developed which protect broadcasters and accommodate the public, *all* logs should be made available unless the licensee can prove unreasonable or unique burdens.

In a similar vein, I see no valid reason for delaying the applicability of our new rules to radio. Surely, if the public has an interest in objective evaluation of television station program performance, it has at least as much interest in objective analysis of radio performance. Radio is enjoying a resurgence that makes it, in many respects, even more important than television. It seems to me an unnecessary slap in the face to our radio broadcasters to suggest they are not important enough in the eyes of the FCC and the public to warrant their participation in this new procedure. Moreover, if the availability of TV logs would benefit everyone, it seems axiomatic to me that public access to radio logs would do the same. Thus, I think we should address ourselves to the question of making radio logs available *now* under the same or, if necessary, different guidelines. If, at some future date, the re-regulation task force determines that there are valid reasons warranting a different result, we can change the rules at that time. In the interim, however, I think consistency, fairness and administrative efficiency dictate that our new rules should be applicable to radio.

For the above reasons, I concur in part and dissent in part to the Commission's order, with the hope that oral argument will shed additional light on these issues.

[1] By our recent action in Docket #19153 we resolved the question of time and space guidelines for the annual composite week logs by including them in the public file. Accordingly, they will be available to the public during normal business hours. While I believe that the volume of log materials being considered might raise some additional problems that the Commission should consider in its final decision on the matter, I am confident that we can devise guidelines that will serve the interests of both licensees and the public.

F.C.C. 73R-376

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN C. ROACH, CALHOUN, GA. For Construction Permit	Docket No. 17695 File No. BP-16665

APPEARANCES

Laurence J. Bernard, Jr., on behalf of John C. Roach; and *John T. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted November 6, 1973; Released November 8, 1973)

By THE REVIEW BOARD, BERKEMEYER, NELSON, PINCOCK.

1. This proceeding involves the application of John C. Roach (Roach) for authorization to construct a new standard broadcast station at Calhoun, Georgia. The Commission originally designated for hearing the mutually exclusive applications of Roach and Gordon County Broadcasting Co. on, *inter alia*, an issue to determine the efforts made by the respective applicants to ascertain the programming needs and interests of the area to be served and the manner in which they propose to meet such needs and interests. Memorandum Opinion and Order, FCC 67-1002, released September 7, 1967, 32 FR 12966, published September 12, 1967. In his Initial Decision, the late Administrative Law Judge Millard F. French concluded that Roach misrepresented facts regarding his program contacts and had not adequately ascertained the needs and interests of the area to be served. The Judge proposed denial of both Roach's application and, for other reasons, the application of Gordon County Broadcasting Co., *John C. Roach*, FCC 68D-49, 20 FCC 2d 260. On appeal, the Commission sustained the Initial Decision as it related to Roach, without ever reaching the Judge's findings of misrepresentation. *John C. Roach*, 20 FCC 2d 255, 17 RR 2d 795 (1968). Roach filed an appeal with the U.S. Circuit Court of Appeals for the District of Columbia. Following the adoption of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971), however, Roach requested that the Commission seek a remand so that he could file an amendment to his showing on ascertainment of community problems. The petition was granted in part (FCC 71-227, 27 FCC 2d 1006) and remand was secured. The Commission then ordered that the proceeding, insofar as it related to Roach, be reopened and remanded to the Judge, and that the issues be enlarged to include the following:

To determine whether John C. Roach misrepresented material facts in testimony and exhibits introduced at hearing in this proceeding.

To determine in light of the evidence adduced pursuant to the foregoing issue whether John C. Roach possesses the requisite qualifications to be a licensee of the Commission.

The burdens of proceeding and proof were placed on Roach. The Commission stated that Roach should be allowed to make a full evidentiary showing of all the circumstances, including any mitigating factors, concerning the alleged misrepresentations. Memorandum Opinion and Order, FCC 71–892, 31 FCC 2d 644, released September 14, 1971. In a Supplemental Initial Decision, FCC 72D–67, released October 31, 1972, the Administrative Law Judge concluded that the applicant had misrepresented material facts in connection with his ascertainment of community needs and that the record failed to show factors to mitigate such misrepresentations. He again proposed denial of the application.

2. The proceeding is now before the Review Board on exceptions filed by Roach. A statement in support of the Judge's Supplemental Initial Decision was filed by the Broadcast Bureau. We have reviewed the Supplemental Initial Decision in light of Roach's exceptions, the Bureau's statement, the arguments of the parties,[1] and our examination of the record. The Board is in basic agreement with the Initial Decision. Accordingly, with the modifications, deletions, and revisions specified herein and our rulings on the exceptions contained in the attached Appendix, the Judge's findings of fact and conclusions are adopted. However, in light of certain legal and factual arguments set forth in the exceptor's brief and raised at oral argument, the Board considers it appropriate to elaborate on some aspects of the decision. In order to facilitate an understanding of our decision we have briefly summarized below some of the significant facts considered in reaching our judgment.

3. The original hearing sessions in this proceeding were held on January 31, 1968, and February 1 and 2, 1968 and a rebuttal session took place on March 25, 1968. The remand sessions were conducted November 10, 1971 in Washington, D.C. and on December 7 and 8, 1971, in Calhoun, Georgia. At the *original* session, John C. Roach introduced an exhibit which stated, in part, the following:

Although Mr. Roach does have a knowledge of the Calhoun area and individuals in the Calhoun community, he had contacted cognizant individuals in Calhoun in connection with the plan to establish a new station in Calhoun. These individuals, identified by the positions they occupy, are as follows:

Page 2 of the exhibit lists the names of eighteen individuals who were allegedly contacted in connection with Roach's plan to establish the new station in Calhoun. When questioned about the substance of these contacts at the original hearing, Roach was unable to recall specifics as to content or dates of the discussions and stated that he had made no notes of the conversations. He nevertheless attributed specific statements to several individuals which he recalled they had made during the course of his contacts with them. Roach testified that he made the contacts to ascertain the needs and interests of the community, as well as to inform those contacted of his availability and willingness to ren-

[1] Oral argument was held before a panel of the Review Board on October 2, 1973.

der service to the organization with which they were associated. When asked what he meant by contact, he said: "Most of these people know, simply because I am well-known in the community, that I am trying to get a radio station. So they really contact me." That these alleged contacts were made informally, casually, and over a period of time is clear from Roach's testimony at the original hearing. However, Roach testified under cross-examination at the original session that at some time or another he talked to all the individuals listed in the exhibit, informed them of his plan to file an application, and asked for their views regarding the programming needs and interests of Calhoun. After Roach's testimony, counsel for the opposing applicant took the depositions of thirteen of those individuals whom Roach represented he had contacted. Five of the thirteen deponents testified that they didn't even know Roach and they all testified that he had not contacted them regarding the programming needs and interests of Calhoun.

4. Notwithstanding the conflicting testimony of the deponents, in the *rebuttal* session of March 25, 1968, Roach reaffirmed his claim that he had contacted several of those individuals listed in his exhibit regarding programming. It was not until the remand hearing in December 1971, that Roach expressed remorse about his original testimony and stated that he could not now recall whether he had asked each of the individuals listed in his exhibit their views regarding the programming needs of the Calhoun community. In addition, except for one witness,[2] Roach could not recall whether he had told the individuals of his pending application. When Roach was asked why he had previously testified that he had contacted all the individuals regarding their views on programming, he responded, "I was confused and it was just stupid of me."

5. With only one exception, the witnesses who testified during the remand proceeding either denied or failed to recall discussions with Roach related to the programming needs and interests of the Calhoun community. In addition, three individuals, whose deposition testimony was accepted in lieu of their appearance, also denied having been contacted by Roach for the purpose of inquiring as to the programming needs and interests in Calhoun. Moreover, on a matter unrelated to Roach's ascertainment efforts, the testimony of Mather Payne contradicted Roach's original testimony that he (Roach) received information from Mr. Payne upon which he relied in estimating advertising revenues during the first year of the proposed station's operation. The Judge, as he indicated in his Supplemental Initial Decision, had relied on this latter representation in favorably resolving the financial issue originally designated against Roach.

6. In mitigation, Roach offers several excuses. The applicant claims that he was confused since this was the first time he ever had to testify; that he was not adequately prepared by counsel; that counsel was suffering from an emotional problem at the time he retained him and throughout the initial hearing; and that he (Roach) was having marital difficulties. Roach also claims, as noted *supra*, that by the word "contact" he meant only casual conversations and whether he was known by and knew the leaders of the community. Although an affidavit submitted to the Commission in 1968 suggests the contrary,

[2] Of the eighteen individuals listed on the exhibit, 13 were deposed prior to the remand. At the remand hearing, ten of the deponents and five others listed in the exhibit appeared as witnesses.

Roach claims that his attorney only asked him for a list of people he *knew* in the Calhoun community.

7. The Review Board agrees with the Administrative Law Judge that the facts, as summarized above and detailed in his findings, reflect an intention on the part of Roach to misrepresent his efforts to ascertain community needs and interests. Moreover, he undertook to buttress the veracity of his alleged contacts by attributing specific statements to certain individuals—statements which each individual denied having made. Of critical significance, however, is Roach's continued assertion, even after becoming aware that his claims were disputed by deposition testimony, that he had contacted certain individuals regarding programming. Had Roach admitted, even at the rebuttal session, that either he had not made contact with those individuals as originally characterized or could not recall the substance of the conversation, we might have found ourselves faced with a more difficult task in reaching our conclusion. This was not the case however. Rather, Roach attempted to excuse his conduct by alleging confusion, unpreparedness and semantic misunderstanding, all of which we find unpersuasive. The Board agrees with the Judge's conclusion that Roach did not make his alleged confusion known on the prior record and that, notwithstanding unpreparedness, the questions Roach was asked were uncomplicated and clearly within the scope of his knowledge. We fail to see how Roach's marital problems, his unpreparedness or his attorney's illness have any relevance to his ability to respond truthfully to matters entirely within his own knowledge. Conversely, we find that the mitigating circumstances alleged by Roach only constitute a further admission that he lacks the disposition to respond spontaneously in a truthful fashion. Furthermore, our conclusion regarding Roach's willingness to misrepresent the true nature of his ascertainment efforts is buttressed by the testimony of another witness who denied having given Roach the information upon which Roach stated that he based his projection of advertising revenues to be received during the proposed station's first year of operation.

8. In reaching its conclusion, the Board notes that Roach's conduct has not been evaluated from a standpoint of compliance with the requirements of the *Primer*. We recognize that those requirements were in a state of flux at the time of the original hearing, and that applicants had considerable latitude in their methodology to ascertain community needs and interests. We do not fault Roach for having conducted his survey in a casual, informal fashion. Our concern here is not whether he met with a community leader while passing him on the street or at a Christmas party. We are solely concerned with the applicant's willingness to deceive the Commission, notwithstanding the significance or materiality of the deceptions. See *Federal Communications Commission* v. *WOKO*, 329 U.S. 223 (1946).

9. The Board recognizes and fully appreciates exceptor's argument regarding the difficulty presented in resolving an issue depedent on an evaluation of a man's intent. A state of mind is ordinarily not capable of indisputable proof. However, it is for this very reason that we cannot accept Roach's attempt to persuade us that his conduct should be excused based on facts developed in prior proceedings where intent

was at issue. For example, in *Emerald Broadcasting Co.*, 30 FCC 2d 879, 22 RR 2d 633 (1971), and *Noble Broadcasting Co.*, 1 FCC 2d 154, 55 RR 2d 915 (1965), the Commission found evidence of carelessness (*Noble, supra*) and exaggeration, puffing and slipshoddiness (*Emerald, supra*) in representations made to the Commission. However, in each case, the evidence fell short of that degree of culpability warranting an inference of willfulness and wantonness. Although the nature of the evidence presented in these prior proceedings may have been in some respects similar to that presented here, the inference warranting a conclusion of willfulness and wantonness (lack of candor) can only be made in light of all the facts presented in the particular case under consideration. In *Grenco, Inc.*, 39 FCC 2d 732, 26 RR 2d 1046 (1973), cited by counsel for Roach at oral argument, the Commission stressed that its holding was based on the particular facts of that case. It is noteworthy that it concluded by emphasizing that its *judgment* was strictly a *factual* one. Similarly, we view our judgment in this proceeding to be based on the particular facts developed at the hearing in this proceeding. Moreover, our conclusions as to Roach's intent are not based solely on an abstract analysis of whether the facts presented are consistent with human behavior but on the applicant's own admission confirming the mendacity of his original testimony.

10. In the above discussion, the Board has not attempted to describe all of the contradictory testimony which is detailed in the Judge's findings. Our decision is based, however, on a review of the entire record and our conclusion that the particular facts of this case, viewed in their entirety, clearly establish that Roach misrepresented facts in his exhibit and that in his testimony presented at the original hearing sessions he sought to buttress the allegations made in his exhibit by fabricating specific statements which he attributed to named individuals, all of which were denied under oath by the individuals concerned. Moreover, the Board cannot accept Roach's contention that offsetting circumstances exist to mitigate such conduct. In quoting from the Administrative Law Judge's Initial Decision in *Nick J. Chaconas*, 28 FCC 2d 231, 233, 21 RR 2d 576, 579 (1971), reconsideration denied 35 FCC 2d 699, 24 RR 2d 811, (1972), the Commission clearly articulated the gravity with which it views representations made to it by broadcasters:

> The Commission can, and must, demand candor from licensees when a station is inspected by representatives of the Commission. The Commission can, and must, demand candor from its licensees in their response to Official Notices of Violations. ***Above all, when a licensee is called before the Commission, the Commission must be able to rely on the representation made by the licensee and those which he has caused to be made on his behalf during the hearing process.*** If the Commission cannot rely on a licensee in any of three areas, the licensee lacks the basic character qualifications to remain a licensee. . . . (Emphasis supplied.)

In light of the foregoing, the public interest would not be served by granting Roach's application for a new standard broadcast station.

11. Accordingly, IT IS ORDERED, That the application of John C. Roach (BP–16665) for a construction permit for a new standard broadcast station at Calhoun, Georgia, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

APPENDIX

Rulings on the Exceptions of John C. Roach

Exception No.	*Ruling*
1	Denied. Except as discussed herein, the matters raised are of no decisional significance. With regard to the claims made in sub-paragraphs a and f that Roach talked with people in the Calhoun area in the early 1960's while employed at WCGA or while working on another radio application, these matters are adequately covered in the Judge's Supplemental Initial Decision at paragraphs 10 and 30 of the findings and paragraph 3 of the conclusions.
2	Denied. The matters contained in this exception are adequately and accurately set forth in the Supplemental Initial Decision. With respect to the nature of the contacts and the period when the contacts were made, see our ruling above. With regard to sub-paragraph c and the degree of preparation Roach had with counsel, this matter is not clear from Roach's testimony and, in any event, must be left unresolved as pointed out by the Judge in paragraph 10 of the conclusions. Also see paragraph 7 of this decision. See our ruling on exception 16, *infra*. The matter raised in paragraph d is of no decisional significance.
3	Denied in part and granted in part. Although the record reflects that Roach was initially asked whether he conducted a "survey" and not, as objected to, a "program survey", Roach, in response to questions on cross-examination, testified that he had contacted people in Calhoun and asked them their views regarding the "programming needs and interests of Calhoun". The use of the term "program survey" is, therefore, warranted. To the extent that the Judge's findings and, in particular, finding 34, do not *firmly* suggest that Roach testified, *ab initio*, that his contacts were conducted informally, the Board will grant the exception. See paragraph 3 of the Decision.
4	Denied in part and granted in part. It is true that Roach expressed doubt at the original hearing session as to *when* he contacted Messrs. Wood or Norton. To that extent, the exception is granted. However, Roach did not disclaim having contacted these individuals. With respect to Mr. King, it is true that Roach expressed doubt about the contract, but again only as to *when* and not as to whether he made such contact. He stated that he "did contact this man in some form." (Tr. 124.)
5	Denied in part and Granted in part. Roach was specifically asked at the remand hearing what individuals he contacted in connection with his plan to establish a new station in Calhoun. He named Shanahan, Robertson, David, Ashworth, Brannon and Dickinson. With respect to Ashworth, the Judge's findings at paragraph 20 accurately reflect Mr. Ashworth's testimony. With respect to Mr. Brannon, the record reflects that Mr. Brannon recalled a telephone conversation with Roach during which something about a radio station was mentioned. To the extent that the witness recalled something about radio, the exception will be granted and considered in paragraph 21 of the findings. Also see our ruling on exception 9, *infra*. With respect to Mr. Robertson, finding paragraph 18 of the Supplemental Initial Decision accurately reflects the witness' testimony and paragraph 19 of the findings accurately reflects the testimony of

Exception No.	*Ruling*
	Mr. Shanahan. Although Mr. David did state that programming might have been discussed, paragraph 15 of the Supplemental Initial Decision accurately characterizes Mr. David's testimony. With respect to Mr. David's support of Roach's integrity and honesty, this matter has been considered in reaching our decision. With respect to Mr. Dickinson, paragraph 16 of the findings accurately reflects this witness' testimony.
6	Denied. That Mr. David thought that *Roach* might have conversed with him regarding programming is of no decisional significance, particularly in light of the number of individuals unable to recall such conversations as well as Roach's own inability to affirmatively state at the remand session that these people had been contacted regarding programming. With regard to the remaining portions of the exception, the findings in the Supplemental Initial Decision are adequate or the requested findings are of no decisional significance.
7	Denied. Part of the finding requested is of no decisional significance. That part of the requested finding which might have a bearing on the decision is not supported by the record. See paragraph 16 of the findings.
8	Denied. Paragraph 17 of the findings accurately reflects the record. Paragraph a of the exception is either repetitious or without decisional significance.
9	Denied in part and Granted in part. Paragraph 21 of the findings accurately reflects the record. To the extent that the witness stated that in the telephone conversation something about a radio station was mentioned, the exception is granted. The remaining portion of the exception is without decisional significance.
11*, 12, 13	Denied as being of no decisional significance.
14	Denied. Paragraph 31 of the findings adequately and accurately reflects the record.
15	Denied in part and Granted in part. Except as discussed below, paragraph 32 of the findings adequately and accurately reflects the record. (a) The matter raised in this exception is adequately covered in paragraphs 34 and 35 of the findings. As to the informality of Roach's contacts, also see our ruling on exception no. 3. (b) This matter is either adequately covered in paragraphs 32, 33 and 35 of the findings or has been covered in exception 4 of our rulings. (c) Granted in part. To the extent that the exception sets forth five individuals to whom statements were attributed, the exception is granted. In all other respects, the exception is denied as either being of no decisional significance or as having been adequately covered in the following paragraphs of the Supplemental Initial Decision: 8, 9, 16, 17, 24, 27, 28 and 32.
16	Denied. With the exception of the matter discussed below, paragraph 33 of the findings adequately and accurately reflects the record. (a) The record is not clear as to when Roach discussed this case with his attorney. Neither the Judge's nor exceptor's Finding appears warranted from a reading of the record. However, since the attorney was deceased, the Judge's conclusion at paragraph 10 that this matter must be left unresolved is affirmed.

*Roach's exceptions contain no number 10.

Exception No.	*Ruling*
	(b) These matters are adequately treated throughout the Supplemental Initial Decision. (c) The matters raised are either of no decisional significance or have been adequately and accurately covered in paragraphs 30 and 34 of the findings and paragraph 3 of the conclusions. (d) The matters have been adequately and accurately covered in paragraph 10 of the findings and paragraph 3 of the conclusions.
17	Denied as either being of no decisional significance or such finding is not warranted from a fair reading of the record.
18	Denied. See our ruling to exception no. 3.
19	Denied in part and Granted in part. As set forth in our ruling on exception No. 5, we believe the Judge's findings with respect to the testimony of Messrs. David, Shanahan, Ashworth, Robertson, Brannon and Dickinson accurately reflects their testimony. At the remand hearing, Roach named these individuals as having been contacted in connection with his plan to establish a new station in Calhoun. Robertson testified that he could recall only that Roach expressed a desire for a radio station. We believe that the witness' testimony justifies the conclusions reached by the Judge. With respect to Dickinson, and Shanahan the record clearly supports the conclusion reached by the Judge. See paragraph 16 and 19 of the Supplemental Initial Decision. With respect to David, Ashworth and Brannon, it appears that Roach talked with these individuals about financing a radio station (David) or about local programming (Ashworth) or something about a radio station (Brannon). To the extent the Judge's conclusions gives the impression that no "contract" was made, the Judge's conclusions are amended to reflect the witness' recollections as noted above. The record does support the conclusion, however, that, with the exception of David, those witnesses did not have a clear idea as to Roach's reason for the contact. In addition, with the exception of Ashworth, all of the witnesses either denied or failed to recall any conversation regarding programming needs and interests. See the text of this decision in this regard.
20	Denied. Although at the original hearing Roach made some reference to his work on another application and that he had been contacting people over a period of time, the Judge's first sentence in conclusion paragraph 3 is supported by the record. With respect to the recollection of those who were allegedly contacted in the early 60's, Robert's name should be added to those who can corroborate some type of contact. In any event, of decisional significance is Roach's *contradictory statements* as to when these contacts took place and to their substance, not whether, for the purpose of complying with the *Primer*, they took place in 1960 or some subsequent period. See the text of this decision in this regard.
21	Granted. Mr. Gray had no personal knowledge of whether Roach actually conducted a survey in connection with the Reliable application and, therefore, his testimony, based on mere speculation, is of no decisional significance.
22, 24, 27, 30–35	Denied for the reasons set forth in this decision.
23	Denied in part and Granted in part. The record supports the Judge's conclusions with respect to Defoor and Head. Roach did express doubt about when Woods was contacted and to that extent the exception is granted.

Exception No.	*Ruling*
25	Denied in part and Granted in part. To the extent that the Judge included construction costs in his conclusion, the exception is granted. In all other respects the exception is not supported by the record.
26	Denied. (a) The second sentence of conclusion paragraph 8 is clearly supported by the record. Also see the text of this decision. With regard to paragraphs (b), (c), (d), (e) and (f).
28	Denied. Judge's conclusions are supported by the record. Also see the text of this decision.
29	Denied in part and Granted in part. Given a loose definition of "know", the Judge's conclusion should be changed to indicate that Roach did not know *some* of the individuals allegedly contacted. In all other aspects, the Judge's conclusions are accurate.

F.C.C. 72D-67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN C. ROACH, CALHOUN, GA. For Construction Permit	Docket No. 17695 File No. BP-16665

APPEARANCES

Lawrence J. Bernard, Jr., on behalf of John C. Roach; and *John T. Kelly* and *Joseph Stirmer*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MILLARD F. FRENCH

(Issued October 26, 1972; Released October 31, 1972)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order released September 7, 1971, the Commission reopened the record in this proceeding and remanded the above-captioned application to the presiding officer for further consideration and for preparation of a Supplemental Initial Decision. A recitation of the pertinent background will place in perspective the matters that are to be considered in this proceeding.

2. By Decision adopted October 29, 1969, the Commission denied the above-captioned application of John C. Roach (Roach) for failure to meet an issue requiring a showing of the efforts made to ascertain the community needs and interests of the area to be served and the means by which these needs and interests would be met. In the same Decision, and for reasons entirely unrelated to the present matter, the Commission denied the mutually exclusive application of Gordon County Broadcasting Company (Gordon County) for renewal of license of standard broadcast station WCGA at Calhoun, Georgia. The Commission's action denying Gordon County's application has been affirmed by the United States Court of Appeals for the District of Columbia Circuit, 446 F.2d 1335 (1971). Accordingly, this proceeding is presently limited to matters concerning Roach's application. Roach filed an appeal of the Commission's Decision with the United States Court of Appeals for the District of Columbia Circuit. Following release of the *Primer on Ascertainment of Community Problems by Broadcast Applicants* on February 23, 1971, however, Roach filed a petition requesting that the Commission seek remand so that pursuant to Paragraph 79 of the *Primer* he could file an amendment to his application providing a further showing on ascertainment of community problems. The petition was granted, in part, by order released March 4, 1971, and remand of the proceeding insofar as it involved

Roach was requested and granted. In the spring of 1971, Roach undertook a survey of community leaders and the general public in the service area, and filed a petition for leave to amend application setting forth the results of the survey on May 24, 1971. As noted, the Commission reopened the record and remanded the proceeding for further hearing on September 7, 1971. Roach's petition for leave to amend was granted on September 22, 1971.

3. During the original hearing in this proceeding, Roach claimed that he had contacted 18 community leaders in ascertaining community needs. Gordon County subsequently took depositions of 13 of those leaders, some of whom denied even knowing Roach, and all but one of the remainder denied any contact with him concerning ascertainment of community needs. In view of these circumstances, it was concluded that Roach had misrepresented facts regarding his program contacts and the Initial Decision proposed to deny Roach's application. In lieu of exceptions to that Initial Decision, Roach requested the Commission to reopen the record and to enlarge the issues for a full exploration of the matters relating to the alleged misrepresentations. However, the Commission, in its October 29, 1969 Decision, having found that Roach had failed to ascertain the needs of his specified community, deemed it unnecessary to consider any questions concerning the alleged misrepresentations.

4. On May 24, 1971, Roach filed his aforesaid petition for leave to amend his application in order to make a further showing of his efforts to ascertain community needs. The Bureau filed comments on the petition on June 3, 1971. In view of the foregoing history of this proceeding, the Commission determined that a full evidentiary showing of all the circumstances, including any mitigating factors, concerning the alleged misrepresentations was required. Since a further hearing was required, the Commission referred the aforementioned pleadings to the presiding officer for his initial consideration in conjunction with the preparation of a Supplemental Initial Decision. At the same time, the Commission, on its own motion, enlarged the issues in this proceeding to include the following:

To determine whether John C. Roach misrepresented material facts in testimony and exhibits introduced at hearing in this proceeding.

To determine in the light of the evidence adduced pursuant to the foregoing issue whether John C. Roach possesses the requisite qualifications to be a licensee of the Commission.

The Commission placed the burden of proceeding with the introduction of evidence and of proof under the issues added on John C. Roach.

5. Prehearing conferences were held on September 22 and November 3, 1971. A hearing session was held on November 10, 1971 in Washington, and further hearing sessions were held on December 7 and 8, 1971 in Calhoun, Georgia. The hearing record, held open pending receipt of a Broadcast Bureau exhibit, was closed by order released March 13, 1972.

FINDINGS OF FACT

6. This proceeding has been remanded to determine whether John C. Roach misrepresented material facts in testimony and exhibits introduced at earlier hearing sessions held on January 31, 1968, February

1 and 2, 1968, and on March 25, 1968, and, if so, whether John C. Roach possesses the requisite qualifications to be a licensee of the Commission. An additional issue is the ascertainment of community needs. A former issue relating to financial qualification has been favorably resolved in favor of the applicant.

7. The pertinent exhibit is a two-page document entitled John C. Roach Exhibit No. 1. The relevant portions of that exhibit include the last paragraph of page 1 and the names listed on page 2. The last paragraph states:

> Although Mr. Roach does have a knowledge of the Calhoun area and individuals in the Calhoun community, he had contacted cognizant individuals in Calhoun in connection with the plan to establish a new station in Calhoun. These individuals, identified by the positions they occupy, are as follows:

There follows, on page 2 of Roach Exhibit 1, the following list of names:

County commisioner	Everett DeFoor.
Tax commissioner	W. G. Robertson.
Clerk of court	Floyd Whittemore.
Ordinary	Max Brannon.
Sheriff	Hughdon Davis.
Superintendent of schools	Wayne L. Ashworth.
County attorney	J. C. Maddox.
Mayor	Frank M. Dickinson.
City clerk	Hoyt Edwards.
Alderman (4)	Arden J. King.
	John T. Woods, Jr.
	W. R. Norton.
	Tom B. David.
City superintendent	James S. Owens.
Police chief	Luther Roberts.
Fire chief	Carlton T. Hyde.
City attorney	T. L. Shanahan.
Representative of general assembly	T. L. Shanahan.
Chamber of commerce	Al W. Head, President.

8. At the original hearing, Roach testified that he asked Everett DeFoor what sort of programming was desirable; that he talked to Floyd Whittemore numerous times over a period of five years and mentioned his proposed radio station to Whittemore at a Christmas party in December 1967; that he had a lengthy conversation with Al W. Head regarding programming; that he talked to Frank Dickinson "last Friday" and had talked to him at his office regarding the radio station; that he talked to Arden J. King; that he talked to Max Brannon by phone regarding his proposed station; that he talked to Hughdon Davis more than once regarding his proposed radio station; and that he talked to Hoyt Edwards on the phone.

9. Moreover, Roach testified that several of these individuals made specific comments to him during the course of his contact with them. For example, Roach testified that he had seen Everett DeFoor three or four times over the last two years and DeFoor told him "If I can be of any help in connection with the radio station, let me know"; that Floyd Whittemore would come up and pat him on the back and say "John, when are you coming to Calhoun? We sure need a good radio station here"; that Frank Dickinson would pass him on the street and say, "John, how is your radio station coming along?"; and that James Owens told him "If I can be of any help to you, let me know".

10. Roach also testified that he made a program survey of Calhoun prior to the time his application was filed in March 1965. Roach testified that he talked to all the individuals listed above at one time or another, informed them of his plan to file an application and asked for their views regarding the programming needs and interests of Calhoun. He did not take any notes and did not recall the dates when the contacts were made. He made the contacts both to inform the individuals of his availability and willingness to render service to the organizations with which they were associated, as well as to learn the needs and interests of the community. Aside from the fact that a demand for more local news was consistently voiced by those contacted, Roach was unable to relate the specifics of any conversations.

11. During the course of Roach's testimony, counsel for Gordon County stated on the record that he had evidence, in the form of affidavits, that Roach had not contacted most of the individuals listed by him. Thereafter, Gordon County filed a notice to take the depositions of Floyd Whittemore, Everett DeFoor, J. C. Maddox, Luther Roberts, Hoyt Edwards, James S. Owens, Hughdon W. Davis, John T. Woods, Max Brannon, Frank Dickinson, Arden J. King, W. R. Norton and Al W. Head. Despite the fact that Roach had notice that the depositions would be taken and that the testimony would relate to his contacts with these individuals, no effort was made by him to be in attendance, or to be represented at the deposition proceeding.

12. The testimony of the deponents contrasted sharply with Roach's testimony. Specifically, Norton, Maddox, Owens, King and Head testified that they don't even know Roach. Additionally, DeFoor and Dickinson are not sure they know Roach. Whittemore, Edwards, Davis, Woods, Roberts, Brannon, Norton, Maddox, Owens, King, Head, DeFoor and Dickinson all denied ever having talked to Roach about radio programming or even knowing, until about a month or so prior to their depositions, that Roach had filed an application. DeFoor specifically denied making statements attributed to him by Roach in his testimony. In sum, the deponents' testimony was to the effect that they had not been contacted by Roach regarding the programming needs and interests of Calhoun.

13. In rebuttal, Roach again testified regarding his program contacts. He testified that he contacted Whittemore, Owens, DeFoor, Maddox, Roberts, Edwards, Davis, Brannon and Head. He further testified that he was not sure whether he talked to Norton, Woods or King. Roach took no notes relating to his program contacts. He was unable to relate the specifics of any conversation he had, nor was he able to recall with any degree of specificity the date the contact was made. Roach testified that he had no knowledge of any animosity between himself and any of the deponents.

14. At the remand hearing, Roach says that prior to the original hearing, and in connection with his plan to establish a broadcast station in Calhoun, he contacted Messrs. Shanahan, David, Robertson, Ashworth, Brannon and Dickinson. Roach does not remember whether, with the exception of David, he told each of these individuals that he had filed an application, or whether he inquired of each individual his view concerning the programming needs of the Calhoun community. Roach offered the following description of these "con-

tacts." The testimony of the respective witness follows that of Roach and is included in the same paragraph.

15. *Thomas B. David*—Roach knows that he has talked to David in his office and in the bank on three occasions concerning local news and programming. David testified in the remanded proceeding that he believes that he has never had a conversation with Roach that concerned programming. David believes that his conversations with Roach prior to January 1968, insofar as Roach's proposed station was concerned, were limited to financial matters.

16. *Frank M. Dickinson*—Roach doesn't remember the occasion on which he talked to Dickinson prior to 1968. Dickinson testified that he did not know Roach prior to January 1968. Dickinson recalls that at or about that time Roach approached him in conversation at his newspaper office. Dickinson thought, on that occasion, that Roach was a salesman. Roach did not tell Dickinson that he had filed an application, nor did he inquire of Dickinson his views concerning the programming needs of Calhoun. The topic of conversation concerned golf. Mr. Dickinson denied making the statement attributed to him by Roach in paragraph 9, *supra*.

17. *Everett DeFoor*—Roach does not remember when or where he met DeFoor on the street, or what he talked about. DeFoor testified that he has known Roach casually about ten years, and can recall no conversation on the street with Roach, nor does he recall any conversation with Roach regarding radio programming, nor is he aware that Roach was once employed by WCGA. Mr. DeFoor denies the statement attributed to him by Roach in paragraph 9, *supra*.

18. *Bill Robertson*—Roach remembers talking to him once concerning programming but he doesn't remember when or the gist of the conversation other than it was pertaining to some phase of radio. Robertson recalls that, on one occasion prior to January 1968, Roach expressed to him his interest in operating a radio station in Calhoun but the details of the conversation are vague in his mind. Robertson believes that he expressed to Roach his feeling that Gordon County could support two radio stations. Roach did not tell him that he had filed an application nor did he inquire of Robertson his views concerning the programming needs of Calhoun. Robertson has known Roach for about 20 years and recalled that he was employed at WCGA. Robertson provided Roach with news items concerning tax deadlines.

19. *Tom L. Shanahan*—Roach remembers that he talked to Shanahan "possibly on the street corner walking from the Courthouse to his office." Roach testified that the conversation concerned radio, but not programming. Shanahan testified that he may or may not have recognized Roach, prior to January 1968, if he had seen him on the street. Roach had to introduce himself to Shanahan on the occasion of a recent visit to his office. Shanahan related that Roach, on that occasion, tried to indicate to him that they had had a conversation 10 years ago in front of a drug store in Calhoun. While Shanahan was unable to recall the particulars of that or any other conversation with Roach, he stated "I don't say that it didn't happen."

20. *Wayne L. Ashworth*—Roach recalls numerous conversations with Ashworth as the result of Ashworth's calls to radio station WCGA to inform the station of school bus routes due to inclement

weather in the area. Ashworth testified that he has known Roach for years. He recalls that Roach engaged him in conversation three or four years ago concerning the type of programs broadcast on local radio. He does not recall that Roach told him the purpose of his inquiry. Ashworth does not recall Roach personally coming to him for news items but acknowledges that it may have been Roach whom he talked to on the phone at WCGA.

21. *Max R. Brannon*—Roach recalls talking to Brannon concerning radio but he does not recall when, where or the substance of the conversation. Brannon testified that he knows Roach but not personally. Brannon thinks that Roach telephoned him once but he cannot remember the details of the conversation. Brannon stated that he doesn't recall whether Roach told him that he had filed an application, or whether Roach inquired of him as to his views concerning the programming needs of Calhoun, but he (Roach) could have.

22. *Luther Roberts*, identified as Police Chief, was a patrolman during the time Roach was employed at WCGA. Roberts has known Roach for many years, and recalls that Roach was employed at WCGA. However, Roberts can recall only one conversation with Roach concerning radio matters, and that one occurred at a local restaurant prior to the time he became Police Chief. The substance of the conversation concerned Roach's job, or that was Roberts' impression. Roberts has never suggested programming to anyone.

23. *Carlton Hyde*, identified as Fire Chief, was a fireman during the time Roach was employed at WCGA. Hyde knows Roach, and recalls that Roach was employed at WCGA. However, Hyde was not in a position to be contacted for news items at that time, and does not recall any such contacts. He does not remember any conversation with Roach regarding radio programming.

24. *James S. Owens*, identified as City Superintendent, did not assume that position until after Roach's employment at WCGA had ended. Owens was not approached by Roach for news items while he was employed at WCGA. Owens did not know Roach until "the other day," and, on that occasion, Roach had to introduce himself to Owens. Mr. Owens has no knowledge of making the statement attributed to him in paragraph 9, *supra*.

25. *Hoyt Edwards*, identified as City Clerk, did not assume that position until after Roach's employment at WCGA had ended. Edwards, as Alderman and Mayor at the time Roach was employed at WCGA, has known Roach for 15 years. However, Edwards does not recall Roach, while he was at WCGA, approaching him for news items. Edwards stated that he scarcely knew Roach and that, to his knowledge, he has never had other than brief, casual conversations with Roach. None of these conversations concerned programming matters.

26. *Hughdon Davis*, Sheriff of Gordon County, testified that he had known Roach all of his life and that when Roach worked at WCGA he (Roach) contacted Davis for news items on a regular basis. Mr. Davis recalled speaking to Roach at the scene of an automobile accident at which time Roach indicated he would like to come back to Calhoun to operate a radio station.

27. *Floyd Whittemore*, Clerk of the Superior Court of Gordon County, testified that he had known Roach for many years. He also

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indicated that he had spoken with Roach on a number of occasions when meeting him on the street or during casual encounters, but does not recall that he was ever approached by Roach for news items. Whittemore related that, on or about October 4, 1968, Roach and his attorney visited him in his office; that he did not recognize Roach; that he asked Roach, after an introduction from Roach's attorney, why he had made statements to the FCC about him; and that Roach responded that he didn't know why he made those statements. Whittemore acknowledged that he had signed an affidavit indicating that he was aware of Roach's employment at WCGA but stated that he did not now recall Roach's connection with the station. Whittemore further testified that he does not recall ever having a conversation with Roach regarding programming for a proposed new station in Calhoun.

28. *Albert W. Head*, a resident of Calhoun from August 1961 to November 1968, a director of the local Chamber of Commerce for several years, and president of that organization in 1967, stated that he did not know Roach and that he did not recall a conversation with Roach regarding the plan to establish a new radio station in Calhoun. Hyde indicated that while he worked with the Chamber of Commerce, many persons had called him about potential business opportunities in Calhoun but that he did not recall such a call from Roach. Roach testified at both the 1968 and 1971 hearings that he had called the Chamber of Commerce on the telephone from Cartersville after his application had been filed and talked at some length regarding radio and his plans for a new station to a person he believed to be Mr. Head.

29. *John T. Woods*—Roach has known Woods since he (Roach) was a child. Woods testified that he knows Roach because he did shoe repair work for Roach. On the occasion of a recent visit by Roach to Woods at his place of employment, Woods told Roach that he had never talked to him about radio matters. Roach responded that Woods probably had not, but he (Roach) thought he had because he (Roach) worked in Calhoun, and Woods would see him occasionally.

30. Roach claims that, in addition to the "contacts" he made in connection with his instant application, he also conducted a "survey" in connection with another application, that of Reliable Broadcasting Company, filed with the Commission in November 1960. This survey consisted of casual conversations with city officials at local meeting places, and of conversations with local merchants at times when Roach made purchases in their stores. Roach is sure that he mentioned radio programming in his conversations with the local merchants. However, no local merchants were called as witnesses in order to support Roach's claim.

31. *Dr. Winifred B. Gray*, the only witness called who shed light on Roach's efforts in connection with the Reliable application testified that Roach came to him with the idea of filing an application; that he (Gray) obtained three financial backers who eventually filed under the name of the Reliable Broadcasting Company; and that the financial backers left the preparation of the application to Roach and another individual, Les Gradick. Gray testified that he made an effort to keep the Reliable application quiet lest a competitor also file for the frequency. Gray testified that he and Roach seemed to be in accord that

the application should be kept quiet for this reason, but Gray could not say that Roach kept the secret. He does not remember any specific discussions with Roach regarding proposed programming, nor does he remember Roach telling him that he (Roach) was contacting people in Calhoun regarding proposed programming. To the best of Gray's knowledge, the three financial backers did not tell Roach to do so. After the Reliable application was filed, Gray talked about it with Roach once or twice a week over a cup of coffee, but Gray does not remember the substance of these conversations, other than hoping that the application would be granted.

32. At the remand hearing, Roach admitted that he did not conduct a formal program survey of Calhoun prior to the time his application was filed, and that he did not contact each individual listed on page 2 of Exhibit 1 regarding the programming needs of Calhoun. When asked why he had claimed, at the original hearing, that he had contacted each of the individuals concerning the programming needs of Calhoun, Roach replied "I was confused and it was just stupid of me." In addition, Roach cannot remember whether any of the individuals to whom he attributed a specific statement at the earlier hearing actually made that statement to him. Each witness to whom Roach attributed such a statement uniformly denied making it or any similar statement. In order to mitigate his previous testimony, Roach offers several excuses.

33. Roach's first excuse centers about his alleged mental state at the time he gave his previous testimony. Roach claims that he was "confused" mentally because that was the first time he ever testified in a court of law and he had not been adequately prepared by counsel who represented him at that time for such an occasion. However, Roach admits that he did discuss his application with counsel the evening prior to his initial appearance. In addition, Roach claims that the strain of marital difficulties at or about the time of his initial appearance contributed to his mental "confusion." Roach maintains that, at the original hearing, he could not think of dates, places, names and that, if he had been asked his mother's name, he could not have remembered it. Although he thinks he did, Roach does not remember whether he stated his "confusion" during the course of his earlier testimony, but was unable to indicate where, if anywhere, he had stated his "confusion."

34. Roach's next excuse focuses upon the definition of the word "contact." Roach claims that, in his mind, the word "contact," when used at the original hearing, referred to casual, on-the-street-corner conversations, and, further, to whether he was known in the community and knew the leaders of the community. Roach believed, at the time he testified at the original hearing, that he knew and was known by all the civic leaders of Calhoun and, further, that he had had casual conversations with all of them. However, Roach did not check the list name-by-name. On the basis of his definition, Roach believed that the deposition proceeding would produce results favorable to him.

35. In connection with this latter excuse, Roach claims that he did not write the last paragraph on page 1 of Exhibit 1; that he does not remember seeing page 1 of Exhibit 1 until December 7, 1971; and that he was under the impression, at the time he was called upon to

sponsor Exhibit 1, that he was attesting only to his "contact" with the individuals listed on page 2 of Exhibit 1. Roach explains that, in submitting the list of names to Washington counsel to be filed with the Commission, he did not intend to show that he had contacted each of these individuals on a formal basis regarding programming and the needs of the community. He states that counsel had merely requested a list of people in the community whom he knew during his lifetime in Calhoun. Roach claims that, in view of counsel's request, he was unaware that a formal survey regarding the programming needs of Calhoun was required in support of his application. He first became aware that he should have made such a survey after counsel for Gordon County began cross-examination of him.

36. Roach's present testimony concerning counsel's instructions conflicts with a prior statement made by Roach to the Commission in an affidavit dated October 16, 1968. In that affidavit, Roach informed the Commission that counsel had instructed him to obtain a list of local officials whom he had contacted about the broadcast needs of Calhoun.

37. One further matter requires comment. In its Memorandum Opinion and Order released September 7, 1967, designating Roach's application for hearing, the Commission specified an issue inquiring into:

> The basis for Roach's estimate of revenues in the proposed station's first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon to yield necessary funds for the operation of the proposed station during the first year.

At the original hearing, Roach estimated that revenue in an amount of $48,000 would be available during his first year of operation. Roach testified that, in arriving at this estimate, he relied upon the advice of both Les Gradick, who operates an AM station in Rockmart, Georgia, and Mather Payne, manager of WRGA in Rome, Georgia. In the original Initial Decision, it was noted that Roach's evidence regarding the factual basis of his estimated advertising revenue of $48,000 during the first year of operation was not very clear or convincing. However, the presiding officer accepted Roach's evidence since WCGA, which station Roach would replace, had been deriving yearly revenue in that neighborhood.

38. The Bureau called Mather Payne. Mr. Payne testified that he has never conducted a study of the Calhoun economic market for a radio station; that he has no knowledge of what to anticipate in terms of advertising revenue from the Calhoun market; that he did not even know the size of the station Roach anticipated building; and that he has never provided Roach with information regarding construction costs of a proposed station in Calhoun or regarding advertising revenue that might be expected from the Calhoun market. Payne recalls social visits by Roach to WRGA on three or four occasions but he does not remember the conversation turning to the aforementioned matters.

39. The parties stipulated that Roach had been employed at WCGA for four to six months. The parties also stipulated that the persons who had given depositions in this proceeding in 1968 and had not been called as witnesses in the 1971 hearings (Messrs. Norton, Maddox

and King) would have testified in 1971 to the same facts they had testified to in 1968, i.e., that they were not personally acquainted with Roach.

The suburban issue

40. The only two issues in the remanded proceeding concern Roach's alleged misrepresentations, discussed *supra*, and his efforts to ascertain community needs. The latter issue will be the subject of the following paragraphs.

41. The proposed station will place a 5 mv/m or better signal over approximately 85% of Gordon County, Georgia. A 0.5 mv/m or better signal will be delivered to substantial portions of Floyd, Chattooga, Walker, Whitfield, Murray, Gilmer, Pickens and Bartow Counties, all of which are in Georgia. About 25% of Cherokee County, Georgia, will also receive a 0.5 mv/m signal from the station.

42. For the most part, the counties surrounding Gordon have county seats or other cities which are larger or equal in size to Calhoun in which radio stations are located. For this reason, the applicant will not attempt to broadcast programming specifically designed to meet the needs of these areas. However, the applicant has interviewed community leaders in each of these counties and believed that many of their problems are similar to the problems facing Calhoun and Gordon County, and, for this reason, programming designed to serve the needs of Calhoun and Gordon County will also serve the needs of the outlying areas. Also, the applicant plans to maintain contacts with officials in Jasper (Pickens County), Ellijay (Gilmer County), and Chatsworth (Murray County), where no radio stations are located in order to keep abreast of and produce programming to meet the needs of those areas.

43. Calhoun, the county seat of Gordon County, is located in northwest Georgia, 20 miles northeast of Rome, 67 miles northwest of Atlanta and 50 miles southeast of Chattanooga, Tennessee. Interstate Highway 75 from Chattanooga to Atlanta passes two miles east of the city. Other towns in Gordon County include Fairmount (1970 population 623), Oakman (178), Ranger (140), Sugar Valley (143), and Plainville (192).

44. According to the 1970 Census, Calhoun has a population of 4,748, about one-third greater than it had in 1960. Gordon County's 1970 population was 23,570, about 22% greater than its 1960 population. This population is about 94% white and 6% black. Gordon County has 35 industries employing 25 or more people. The largest of these, the Edward Lacey Mills at Fairmount, has 385 employees. Seven other textile plants employ 200 or more people. The Textile Workers Union of America (AFL–CIO) represents workers in one Gordon County plant. The total manufacturing employment in Calhoun and Gordon County is currently about 4,500, including 2,430 men and 2,070 women. Of these, about 85% are employed in tufted textile industry, which has its U.S. production centered in northwest Georgia.

45. The demographic information upon which the applicant relied was more than sufficient to supply him with data concerning Calhoun, Gordon County, and the entire service area. *Inter alia*, it shows that Calhoun's municipal government is operated by a mayor and four

aldermen, all elected for two-year terms. The city police maintains a 13-man force (10 uniformed) and four patrol cars; three regular patrols are made at night. The county sheriff's department has five men on its force (four uniformed) and two patrol cars; the department makes one regular patrol at night. In addition, a joint city-county detective is stationed in Calhoun. Calhoun has one fire station, two fire engines, eight paid firemen and ten volunteer firemen.

46. Gordon County's government is managed by a Commissioner of Roads and Revenues, who is elected for a four-year term. The Gordon County Board of Education operates six elementary schools and two combination elementary-high schools with a total of about 3,000 students. The city of Calhoun operates three elementary schools, one junior high school and one high school, for 1,800 total students. A separate vocational training center adjacent to the Calhoun High School offers training in auto mechanics, drafting, cosmetology, welding, electrical wiring, and the industrial arts. The Georgia Cumberland Academy is a private school located south of Calhoun in Gordon County.

47. Also Calhoun has a year-round recreation program with a paid full-time director. Funds to support the program come from the city, the county and Calhoun Women's Club; the annual budget is between $35,000 and $40,000. Facilities include one football field, four lighted baseball diamonds, three tennis courts, two swimming pools, two gymnasiums, one golf course, one ceramic department, one senior citizens club and fraternal organizations. Allatoona Lake, 23 miles south, offers fishing, boating and swimming facilities while the Chattahoochee National Forest, immediately west of Calhoun, offers camping and nature retreats.

48. In September of 1969, Roach conducted a survey of community leaders in Calhoun, Adairsville, and the rural areas of Gordon and Bartow Counties. He personally interviewed each person contacted and informed each interviewee that he planned to establish a radio station in Calhoun. Immediately after each interview, he completed a report form supplied to him by his counsel. The 27 persons interviewed were:

Frank Dickinson, Mayor of Calhoun.
Mr. Robert Collins, Chairman of the Calhoun School Board.
Mr. E. L. DeFoor, County Commissioner of Gordon County.
Mr. Thomas Upchurch, Principal of the Calhoun High School.
Mr. Harbin M. King, Gordon County Ordinary.
Chief Luther Roberts of the Calhoun City Police Force.
Mr. Don L. Platt, Treasurer of the Georgia Cumberland Academy.
Mr. W. A. Sowers, Principal of the Georgia Cumberland Academy.
Mr. J. W. Moss of the U.S. Agricultural Agent Office for Gordon County.
Mr. Milton Stewart, also of the Gordon County Agricultural Agent Office.
Mr. A. C. Ward, Assistant Fire Chief for the city of Calhoun.
Reverend Roy Matthews of the predominantly Negro Friendship Baptist Church.
Mr. Billy Bearden of the Calhoun City Recreation Department.
Mr. Darrel Jones, President of the Calhoun Chamber of Commerce.
Mr. Bruce Thomas of the Thomas Funeral Home.
Mrs. Mildred Waltman, Executive Secretary of the local Chapter of the American Red Cross.
Mr. Thomas L. Richardson, President of Learing Laboratories, Inc.
Mr. John Bruce, a director of the Calhoun Jaycees.
Mr. Doyle E. Fowler, a member of the Gordon County Board of Education.
Mr. J. B. Moss, Chief of the Adairsville Police Department.
Mr. J. E. McKelvey, city of Adairsville Councilman.

Mr. W. E. Penfield, Mayor of Adairsville.
Mrs. Lois Garden, Clerk of the city of Adairsville.
Mr. Marion Lacy, Principal of the Adairsville High School.
Mr. Tom Boston, Bartow County Forest Ranger.
Mr. Reed Hopson, President of the Adairsville Development Corporation, a City Councilman, and Chairman of the Recreation and Planning Commissions.
Mrs. Betty Ann Fields, Secretary to Mr. Hugh Price, Bartow County Agricultural Agent.

49. In the spring of 1971, Roach personally conducted interviews with community leaders in Calhoun and surrounding Gordon County. He told each of the persons interviewed that he was planning to operate a new broadcast station in Calhoun and wanted to obtain some information about the area. Immediately after each interview, he completed a report form supplied to him by his counsel. The 36 persons interviewed and their positions are as follows:

Mrs. Jerline Porch (Black), Chairman, Gordon County Council on Human Relations.
James C. Boyd, Executive Director, Housing Authority of the City of Calhoun.
Frank Overton, City and County Detective.
Frank M. Hobgood, Board Member, Chamber of Commerce.
Frank Dickinson, Mayor of Calhoun.
George Hayes, Chief, Calhoun Police Department.
Eddie Duffes, Secretary-Treasurer, Kiwanis Club.
Dean D. Hayes, Chairman, Coosa Valley Planning and Development Commission.
Jack Mullins, Owner, Medical Arts Pharmacy.
Wayne L. Ashworth, County School Superintendent, Gordon County Board of Education.
Estes Pass, Water Plant Superintendent, city of Calhoun.
Billy Padgett, Alderman, city of Calhoun.
Charles E. Anderson, President, Calhoun Jaycees.
G. Vassa Cate, Superintendent, Calhoun Schools.
Robert A. King, Deacon, West Union Baptist Church.
Rodney Harbin, Board Member, Chamber of Commerce.
David Chattam (Black), Chairman, Gordon County Community Action.
Mrs. Carrie A. Chattam (Black), President, Gordon County Civic Club.
John Chattam (Black), Gordon County Civic Club.
Billy N. Baxter, Chairman of Board of Directors, Gordon County Unit of American Cancer Society.
T. W. Moss, Member, President, Kiwanis, Community Club.
A. C. Owens, Jr., Past President, Calhoun Jaycees.
Mrs. James P. Beamer, Secretary, Chamber of Commerce.
Darrel W. Jones, Executive Vice President, Gordon County Chamber of Commerce.
Larry W. Thacker, Member Board of Directors, Northwest Georgia Transportation Club.
Everett L. DeFoor, County Commissioner, Gordon County.
Jack H. Dyer, County Agent, Cooperative Extension Service.
Jack Holland, Alderman, city of Calhoun.
Philip Beamer, Chairman, Rotary Club.
Reverend Algion P. Perry (Black), Pastor, Friendship Baptist Church.
W. J. Westbrook, Consumer Food Program, U.S. Department of Agriculture.
George N. Brunt, President, Gordon County Chamber of Commerce.
Major Bill Cline, Deputy State Chief, Georgia State Game & Fish Commission.
John K. Adams, Administrator, Gordon County Hospital.
E. G. Elder, Jr., Captain, Calhoun Quarterback Club, and School Board Member, Calhoun City Schools.
George R. Chambers, Principal, Calhoun Elementary School.

50. Also during the spring of 1971, the applicant contacted the following listed community leaders in areas outside of Gordon County which will receive service from the proposed station:

Charles Poagt, Sheriff, Murray County-Chatsworth, Member of Masonic Lodge, Shriner Club.
Robert Ensley, Constable, Murray County-Chatsworth, Member of Masonic Lodge.
Fred McBrayer, Tax Appraiser, Murray County-Chatsworth, Member of Masonic Lodge.
H. O. Cole, County Agent, Murray County-Chatsworth.
Wilburn Hughes, Fire Chief and City Policeman, Gilmer County-Ellijay.
Ted Whitener, City Council Member, Gilmer County-Ellijay.
Clarence Ray, Sheriff, Gilmer County-Ellijay.
W. Rolston, Clerk of Court, Gilmer County-Ellijay, Member of Lions Club Intl.
Loyde Smith, County Agent, Gilmer County-Ellijay, Member of Lions Club.
Havley Cantrell, Sheriff, Pickens County-Jasper.
J. W. Norris, County Agent, Pickens County-Jasper, Member of Shrine Club.
Robert M. Brinson, City Attorney, Rome.
Paul E. Smith, Floyd County Agent.
J. T. Guinn, City Council Member.
Ralph Leatherwood, Chief of Police, Adairsville.
Jim Wheeler, Sheriff, Bartow County.
Walter Culverhouse, Bartow County Agent.
Arch Warren, Tax Assessor, Chattooga County-Summerville.
Charles Sumner, Asst. Dir. of Civil Defense, Secretary-Treasurer, Chattooga County Fair Association.
M. H. Purcell, County Agricultural Agent, Chattooga County-Summerville.
Tom Grubbs, City Recorder/Clerk, Chattooga County.
Clarence Benton, County Agent, Walker County-La Fayette, Member of Rotary Club.
Jim Harless, Public Health Sanitarian, Walker County-La Fayette.
Tom Arnold, County Registrar, Walker County-La Fayette.
Burl Scoggins, County Agricultural Agent, Whitfield-Dalton.
M. A. Mauldin, Deputy Sheriff, Whitfield-Dalton.
Allen Rodgers, Chief, Bartow County Rescue Unit, Deputy Sheriff, Member of Elks Club and Masonic Lodge.

51. In the spring of 1971, the applicant conducted a telephone survey of the general public in the Calhoun area. Telephone calls to 34 people were completed. Immediately after each telephone call, Roach completed a report form which included the date of the interview, the name of the interviewer, the name, area of residence and occupation of the head of the household in which the interviewee lived.

52. The following needs and problems were ascertained in the foregoing surveys:

Housing.
Highways.
Improvement and consolidation of local government.
Job opportunities and job training.
Hospital and medical services.
Race relations.
Inadequate medical facilities and doctor shortage in adjoining counties.
Water and sewer treatment facilities.
Low income housing.
Attracting new industry.
Recreation programs.
High taxes.
Water pollution.
Better shopping areas.

53. After assessing and evaluating the needs and problems discovered in the surveys, the applicant proposed the following programs to meet such needs:

Agricultural

County Agent Reports.—Three fifteen-minute programs per week.
Farm Market Report.—Six ten-minute programs per week.
Weather Reports.—Three five-minute programs per day.

Public affairs

Opinion Please.—One sixty-minute program will be broadcast each day, Monday through Friday.
Calhoun Round Table.—One thirty-minute program per week—discussion of local or area issues among local officials. This program will attempt to treat on an in depth basis a problem such as housing, the consolidation of local government, race relations, better water and sewer facilities, additional highways, additional recreation facilities and programs, and the need to attract new and better paying industry. Civic, industrial and government leaders will be invited to participate in this program and explain existing and proposed programs to meet the needs and problems as discovered in the applicant's surveys which will be made on a continuing basis.

Religion

Daily Devotional.—Six ten-minute programs per week to be produced in cooperation with local ministers.
Religious News.—One thirty-minute program per week.
Weekly Church Service.—A sixty-minute church service will be broadcast each Sunday.

Educational

School Reports.—One thirty-minute program will be broadcast each week.

Other

Job Corner.—Three five-minute programs will be broadcast each day detailing employment opportunities through the station's coverage area, as well as adult education and job training programs available to area residents. The applicant intends to produce this program in cooperation with the Georgia Employment Security Division.
Recreation Today.—A daily fifteen-minute program will be broadcast concerning the development of the area's recreation industry. Information concerning such seasonal activities as hunting, fishing, camping, boating, swimming and water skiing will be featured along with development news.

ULTIMATE FINDINGS AND CONCLUSIONS

1. This proceeding has been remanded to determine whether John C. Roach misrepresented material facts in testimony and exhibits introduced at earlier hearing sessions and, if so, whether John C. Roach possesses the requisite qualifications to be a licensee of the Commission. Roach was also given the opportunity to amend his application to show the results of surveys he conducted to meet the *Suburban* issue.

2. At the original hearing, Roach testified that he had contacted each of the 18 individuals listed on page 2 of Exhibit 1 at one time or another and had asked each for his view regarding the programming needs and interests of Calhoun. Roach states that six, i.e., Shanahan, David, Robertson, Ashworth, Brannon and Dickinson, of the 18 witnesses were contacted in connection with his plan to establish a radio station in Calhoun. However, the findings establish that of these six, Robertson and Dickinson expressly denied such contact, and David, Ashworth, Shanahan and Brannon could not recall any such conversation.

3. At the original hearing in February 1968, Roach testified that his "contacts" with the individuals listed on page 2 of Exhibit 1 could not have been made five–seven years ago. Roach has changed that testimony and now states that his contacts with eight city officials, i.e., Roberts, Hyde, Owens, Edwards, Davis, Ashworth, Robertson and Whittemore stem from his period of employment at WCGA during late 1959 or early 1960. However, only Davis, Ashworth and Robertson were able to corroborate any such contact. Roberts, Hyde and Owens expressly denied it; and Edwards and Whittemore could not recall it.

4. Roach claimed that he conducted a survey in 1960 in connection with the application of Reliable Broadcasting Company. The only witness called, Gray, who had knowledge of the Reliable application, was unable to corroborate Roach's claim. To the contrary, Gray believes that he and Roach were in accord that no effort should be made in the Calhoun community to publicize the Reliable application and that, consequently, it would have defeated their intention for Roach to have conducted a program survey.

5. At the original hearing, Roach testified that several individuals, e.g., DeFoor, Whittemore, Dickinson and Owens, made specific comments to him during the course of his contact with them. At the remand hearing, Roach claims that he cannot remember whether any of these individuals made such a comment. Each respective witness categorically denied making the specific or any similar statement attributed to him by Roach. In fact, Dickinson and Owens did not even know Roach prior to January 1968. Moreover, Roach admitted to one of these witnesses, Whittemore, that he had attributed statements to him which Whittemore had never made.

6. In contradiction of his earlier testimony, Roach now makes no specific claims with respect to six of the individuals listed on page 2 of Exhibit 1, i.e., DeFoor, Head, Woods, Norton, Maddox and King. With the exception of Woods and DeFoor, none of these witnesses knew Roach prior to January 1968. With respect to Woods, Roach admitted to him (Woods) that he had probably not had a conversation with him about radio matters.

7. From the foregoing, it is clear that in his testimony at the original hearing Roach misrepresented the extent and nature of his contacts with members of the Calhoun and Gordon County community. These misrepresentations occurred both prior and subsequent to the time Gordon County took depositions of these witnesses. Moreover, Roach's misrepresentations at the earlier hearing sessions include another matter that was not raised at that time. Contrary to his earlier testimony, Roach was not furnished information by Mather Payne regarding construction costs of a proposed station in Calhoun or regarding advertising revenue that might be expected from the Calhoun market.

8. Roach attempted to excuse his conduct at the previous hearing on the basis, primarily, that his testimony was the product of a confused mind. However, even if his previous appearance was the first time that he had testified, and even if he had had only a cursory conversation with counsel in advance of his appearance, the matters concerning which Roach was questioned were uncomplicated and, further, were peculiarly within the scope of his, not counsel's, knowl-

edge. Furthermore, Roach did not state his confusion on the prior record. Even if Roach's statement that he was aware that a formal survey of the Calhoun area was required only after counsel for Gordon County began cross-examination of him is accepted, it is clear that Roach continued to misrepresent facts thereafter by reaffirming in rebuttal testimony that he talked to the people listed on page 2 of Exhibit 1 in connection with his proposed station. In view of the contradictions throughout his testimony, and the contradictions between his testimony and that of disinterested witnesses, *supra*, it is concluded that Roach's excuse of "confusion" must be rejected.

9. Roach also sought to excuse his conduct on the basis that he did not understand, at the previous hearing, the meaning of the word "contact" in the same fashion as did Commission and other counsel. The testimony reflects that Roach was not satisfied to indicate that he merely knew, or was known by, the individuals listed on page 2 of Exhibit 1, or that he had had casual conversations with each of them. Rather, that testimony establishes that Roach repeatedly indicated that he had talked with a particular witness regarding programming or regarding radio. The record shows that Roach did not know many of the individuals listed on page 2 of Exhibit 1; all of those individuals did not know him; and he had not had casual conversations with all of them. Furthermore, at the remanded hearing sessions, Roach again represented that he had contacted, albeit in casual conversations, the majority of the witnesses regarding programming, regarding radio, or in connection with radio matters. The findings of fact reveal that Roach had not contacted the majority of the witnesses, either formally or informally, regarding programming, radio or radio matters. In addition, any misconception Roach was operating under with respect to the word "contact" does not excuse the fact that he falsely attributed statements to several of the witnesses.

10. Finally, Roach would excuse his conduct on the ground that counsel did not instruct him to conduct a formal survey regarding the programming needs of Calhoun and that he had never before seen page 1 of Exhibit 1. Roach's testimony concerning counsel's instructions conflicts with a prior statement made by Roach to the Commission. There Roach informed the Commission that counsel had instructed him to obtain a list of local officials *whom he had contacted about the broadcast needs of Calhoun*. The conflict between his present testimony and his prior statement, and his statements as to what his former counsel allegedly told him, is unresolved, and must remain so, inasmuch as such former counsel is now deceased. Roach has been found to have misrepresented material facts during the earlier hearing, and his testimony on the reopened record does not present a sufficient basis for excusing such misrepresentations, nor serve to mitigate his conduct.

11. The remaining issue relates to the efforts made by Roach, subsequent to the release of the *Primer*, to ascertain the problems and needs of the community. Upon the basis of the record and the findings of fact set forth hereinbefore, Roach conducted a sufficient number of personal interviews with community leaders in Calhoun and the surrounding service area, as well as with members of the general public, to ascertain the problems and needs facing the area. Such needs were

then evaluated and a program format was devised to accommodate the needs discovered. The duration, time and problems to be covered by each program have been detailed. It is thus concluded that John C. Roach has sustained his burden of proof with respect to the *Suburban* issue.

12. It is well established that an applicant's candor is of the utmost significance in determining his qualifications to be a licensee of this Commission. The record and Roach's own admissions at the remanded hearing establish that he has misrepresented material facts in testimony and exhibits introduced earlier in this proceeding. Furthermore, the record fails to show factors tending to mitigate such misrepresentations. In view of the foregoing, it is concluded that John C. Roach is not qualified to be a licensee of this Commission and, accordingly, his application must be denied.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission is taken by any of the parties or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of John C. Roach for a standard broadcast station at Calhoun, Georgia, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Administrative Law Judge.*

F.C.C. 73R-313

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SOUTHERN BROADCASTING CO. (WGHP-TV), HIGH POINT, N.C. For Renewal of Broadcast License	Docket No. 18906 File No. BRCT-574
FURNITURE CITY TELEVISION COMPANY, INC., HIGH POINT, N.C. For Construction Permit for New Television Broadcast Station	Docket No. 18907 File No. BPCT-4302

MEMORANDUM OPINION AND ORDER

(Adopted August 30, 1973; Released September 4, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition to enlarge and modify issues, filed July 20, 1973, by Southern Broadcasting Company (Southern), requesting modification of the Rule 1.65 issue which the Review Board added against Furniture City Television Company, Inc. (Furniture City) in a Memorandum Opinion and Order, 33 FCC 2d 1044, 23 RR 2d 1197, released March 22, 1972,[1] and also requesting addition of an ineptness issue against Furniture City.[2]

RULE 1.65 ISSUE

2. Southern bases its latest request for modification of the 1.65 issue on information supplied to the Commission by Furniture City in a petition for leave to amend, filed June 27, 1973. This petition stated that the business interests of two Furniture City stockholders, Mr. Herman W. Bernard and Mrs. W. H. Slane, changed in December,

[1] The Review Board added the following Rule 1.65 issue against Furniture City in March, 1972, because of its alleged failure to notify the Commission that one of its stockholders was involved in an anti-trust action:

> To determine whether Furniture City Television Company, Inc., has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes in its application and, if not, the effect of such non-compliance on the basic or comparative qualifications of the applicant to be a broadcast licensee.

In a Memorandum Opinion and Order released December 8, 1972, this issue was modified to encompass Furniture City's alleged failure to timely report: (1) the involvement of five of its principals in another anti-trust action, and (2) the complete business interests of seven principals. 38 FCC 2d 461, 25 RR 2d 1138. In a Memorandum Opinion and Order released January 12, 1973, this issue was again broadened to include Furniture City's alleged failure to timely report the complete business interests of two additional principals. A supplementary pleading by Southern urging still further enlargement was dismissed as untimely. 38 FCC 2d 943, 26 RR 2d 458.

[2] Also before the Board are the following related pleadings: (a) Opposition, filed July 30, 1973, by Furniture City; (b) Broadcast Bureau's Comments, filed August 1, 1973; (c) Reply, filed August 6, 1973, by Southern.

1972 and February, 1973, respectively.[3] Southern claims that this information was reported late without good cause [4] and asks modification of the existing 1.65 issue against Furniture City to include inquiry into this alleged violation. In opposition, Furniture City concedes that the information was reported "slightly belatedly," but points out that it was disclosed on Furniture City's own initiative. Moreover, in its view, the changes "are not significant, nor could failure to report those changes inure to the benefit of Furniture City or to the detriment of Southern."

3. The Review Board will deny the petition to further enlarge the 1.65 issue. The changes in the business interests of Bernard and Mrs. Slane do not involve their holdings in Furniture City or in any actual or potential broadcast licensee. There has been no showing that the changes will in any way affect the comparative status or operational or financial structure of Furniture City. See *Star Stations of Indiana*, 34 FCC 2d 632, 24 RR 2d 165 (1972). Moreover, the failure to report these changes was inadvertent, and there was no attempt at, nor motive for, concealment. See *Harvit Broadcasting Corp.*, 32 FCC 2d 656, 23 RR 2d 328 (1971); *Auburn Publishing Co.*, 34 FCC 2d 134, 24 RR 2d 29 (1972). Finally, the Board believes that the issues are already broad enough to determine whether a pattern of 1.65 violations exists, and therefore we need not enlarge further on this basis.

INEPTNESS ISSUE

4. Southern also requests addition of an ineptness issue, charging that there is a clearly discernible pattern of carelessness, negligence, and inadvertence by Furniture City. In support of this, Southern lists the various issues already added against Furniture City,[5] as well as issues requested by Southern but denied by the Board,[6] and cites prior cases where ineptness issues have been added on the basis of purported similar patterns of violations. In opposition, Furniture City asserts that Southern's petition, rather than pleading any new facts, merely "resurrects tired litanies" previously rejected by the Board.[7] Characterizing itself as a "neophyte" in broadcasting which "cannot be expected to be thoroughly cognizant of all the Commission's complex rules," and terming its alleged violations "minor technical errors voluntarily disclosed," Furniture City maintains that none of the

[3] Specifically, Furniture City reported that Bernard transferred to his children his interest in the Springfield Development Company as of December 31, 1972, and Mrs. Slane transferred to her children and grandchildren her interest in Slane Hosiery Mills, Inc. as of February 28, 1973. Southern, on July 2, opposed acceptance of the amendment on grounds that it was untimely. Furniture City was allowed to supplement its petition and did so on July 11, stating therein that the two stockholders had not thought to inform counsel of the transfers until June, due to business pressures and foreign travel. On August 10, Administrative Law Judge Denniston accepted the Furniture City amendment, FCC 73M–930.

[4] Southern also notes that the 1.65 issue against Furniture City has already been modified once to encompass its alleged failure to timely report the business interests of Bernard.

[5] In addition to the 1.65 issue added and twice enlarged by the Board (see footnote 1), these include: *Suburban* issue, added November 10, 1970 (26 FCC 2d 992, 20 RR 2d 677); Abuse of process issue, added April 21, 1971 (31 FCC 2d 790, 21 RR 2d 868); Section 1.514 issue, added December 8, 1972 (38 FCC 2d 461, 25 RR 2d 1138).

[6] Besides the further modifications of the 1.65 issue denied by the Board (see footnote 1), these include: Section 1.526 issue, denied January 12, 1973 (38 FCC 2d 943, 26 RR 2d 458); Misrepresentation issue, denied July 25, 1973 (FCC 73R–275).

[7] An earlier request by Southern for addition of an ineptness issue was denied by the Board on January 12, 1973 (38 FCC 2d 943, 26 RR 2d 458).

cases cited by Southern supports the addition of an ineptness issue in these circumstances.

5. The Review Board will again deny Southern's request for addition of an ineptness issue. While it is correct that issues against Furniture City have been added or enlarged three times since Southern first *requested* an ineptness issue, it is also true that *no* issues have been added or enlarged against Furniture City since the Board *denied* this initial request in its Memorandum Opinion and Order of January 12, 1973 (38 FCC 2d 943, 26 RR 2d 458). We therefore see no reason to change that opinion and we reiterate here our view that:

> Petitioner's allegations cannot be said to demonstrate a pattern of carelessness, inadvertence, neglect, and indifference to the Commission's Rules and Regulations, nor does the totality of the allegations reflect adversely upon Furniture City's qualifications to be a licensee. . . . While a number of rule violations have been properly raised by Southern, we believe the existing and separate issues previously specified by the Board . . . sufficiently deal with the alleged violations.

6. Accordingly, IT IS ORDERED, That the petition to enlarge and modify issues, filed July 20, 1973, by Southern Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-1133

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of: SOUTHERN RADIO AND TELEVISION CORP., GOLDSBORO, N.C. For Renewal of License for Station WFMC	Docket No. 19857 File No. BR-2681
SOUTHERN RADIO AND TELEVISION CORP., GOLDSBORO, N.C. For a License for Station WOKN (FM)	Docket No. 19858 File No. BLH-5784

ORDER AND NOTICE OF APPARENT LIABILITY

(Adopted October 31, 1973; Released October 31, 1973)

BY THE COMMISSION: CHAIRMAN BURCH NOT PARTICIPATING.

1. The Commission has before it for consideration (a) the captioned applications and (b) its inquiries into the operations of Station WFMC, Goldsboro, North Carolina.

2. Information before the Commission raises serious questions as to whether the applicant possesses the qualifications to be or to remain a licensee of the Commission. In view of these questions, we are unable to find that a grant of the renewal application or the application for a license for an FM Station in Goldsboro would serve the public interest, convenience and necessity, and must, therefore, designate the applications for hearing.

3. Accordingly, IT IS ORDERED, That pursuant to Section 309 (e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent order, upon the following issues:

(a) To determine whether, and, if so, the extent to which the applicant knowingly engaged in fraudulent billing practices or failed to exercise reasonable diligence to see that its agents and employees did not engage in fraudulent billing practices in the operation of Station WFMC, in violation of Section 73.1205 of the Commission's Rules.

(b) To determine whether the applicant violated Sections 73.111 and 73.112 of the Commission's Rules by making false entries or corrections in its program logs or by inaccurately logging the duration of commercial announcements.

(c) To determine whether the applicant violated Section 315(b) of the Communications Act of 1934, as amended, by failing to afford legally qualified candidates for public office the station's lowest unit charge for "the same class and amount of time for the same period" in the sale of time for political announcements preceding the general election of November 7, 1972.

(d) To determine whether, during the general election of November 7, 1972, the applicant violated Section 315(c) of the Communications Act by failing to obtain from certain candidates or their representatives written certificates stating that payment of advertising charges for advertising on WFMC would not violate any limitation on campaign spending specified in paragraph (1), (2), or

(3) of Section 104(a) of the Campaign Communications Reform Act, whichever paragraph was applicable.

(e) To determine whether the applicant has violated the Commission's Rules as alleged in the Official Notice of Violation issued June 21, 1973.

(f) To determine, in light of the evidence adduced under the preceding issues, whether the licensee has the requisite qualifications to be or to remain a licensee of the Commission and whether a grant of the applications would serve the public interest, convenience and necessity.

4. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an order denying the captioned application for renewal of license of Station WFMC, it shall also be determined whether the applicant has repeatedly or willfully violated Section 315(b) and (c) of the Communications Act of 1934, as amended, or the following Sections of the Commission's Rules: 73.39 (d)(2); 73.52(a); 73.56(a); 73.111; 73.112; 73.113(a)(6); 73.114 (b); and 73.1205.[1] If so, it shall also be determined whether an Order of Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, in the amount of $10,000 or some lesser amount should be issued for violations which occurred within one year preceding the issuance of the Bill of Particulars in this matter.

5. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for a forfeiture for violations of those sections of the Communications Act and of the Commission's Rules set out in the preceding paragraph. The Commission has determined that, in every case designated for hearing involving revocation or denial of a license renewal application for alleged violations which also come within the purview of Section 503(b) of the Act, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that inclusion of this Notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

6. IT IS FURTHER ORDERED, That the Chief of the Broadcast Bureau shall serve upon the captioned applicant, within thirty (30) days of the release of this document, a Bill of Particulars with respect to issues (a) through (e), inclusive.

7. IT IS FURTHER ORDERED, That the Broadcast Bureau proceed with the initial presentation of the evidence with respect to issues (a) through (e), inclusive, and that the applicant then proceed with its evidence and have the burden of establishing that it possesses the requisite qualifications to be and to remain a licensee of the Commission and that a grant of its applications would serve the public interest, convenience and necessity.

8. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

[1] See Bill of Particulars for specific dates and details of each alleged violation.

9. IT IS FURTHER ORDERED, That the applicant herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule and shall advise the Commission thereof as required by Section 1.594(g) of the Rules.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Order by Certified Mail—Return Receipt Requested to Southern Radio and Television Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73R–370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST: SOUTHWEST PENNSYLVANIA CABLE TV, INC., CALIFORNIA, PA.	Docket No. 19464 SR–87113

APPEARANCES

Frederick W. Ford and *Lee G. Lovett*, on behalf of Southwest Pennsylvania Cable TV, Inc.; *Daniel M. Redmond*, *John Rafter* and *Richard D. Marks*, on behalf of WIIC–TV Corporation; and *Stephen R. Ross* and *Angela B. Green*, on behalf of the Chief, Cable Television Bureau, Federal Communications Commission.

DECISION

(Adopted October 29, 1973; Released November 1, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND KESSLER.

1. On March 29, 1969, WIIC–TV Corporation (WIIC–TV), licensee of television broadcast Station WIIC–TV, Pittsburgh, Pennsylvania, requested nonduplication protection from Southwest Pennsylvania Cable TV, Inc. (Southwest) on the Southwest system located in California, Pennsylvania, and contiguous communities pursuant to Rule 76.91[1] (formerly Rule 74.1103(e)). Since WIIC–TV placed the most preferred category of signal over California, it was entitled to such protection by the terms of the rule. Southwest responded on April 17, 1969, by filing with the Commission a petition for waiver of the rule. On October 1, 1969, the Commission issued an Order denying the requested waiver, 19 FCC 2d 989, 17 RR 2d 513. Southwest did not seek reconsideration or judicial review of said Order. Although negotiations continued between WIIC–TV and Southwest, WIIC–TV did not withdraw its demand for nonduplication protection and Southwest did not cease delivering the duplicating network signals to its subscribers. On August 23, 1971, WIIC–TV petitioned the Commission for an Order to Show Cause why Southwest should not cease and desist from continuing violation. On March 24, 1972, a Show Cause Order was issued. Thereafter, a hearing was held, and in an Initial Decision, FCC 72D–

[1] The former rule protected a station of higher priority against having its programming duplicated on the same day. *Second Report and Order in Docket Nos. 14895, 15233 and 15971*, 2 FCC 2d 725, 803, 6 RR 2d 1717 (1966). The new rule is basically the same as the former except that it now only requires cable systems, on request of a higher priority station, "to refrain from simultaneous duplication of the higher priority station's network programming . . ." and "[e]xcept for this change from same-day to simultaneous protection, we retain the precedents and policies evolved under the prior rule [Section 74.1103]." *Cable Television Report and Order*, 36 FCC 2d 143, 181, 24 RR 2d 1501, 1547; reconsideration denied 36 FCC 2d 326, 25 RR 2d 1501 (1972).

65, released October 4, 1972, Administrative Law Judge Chester F. Naumowicz, Jr., concluded that Southwest had not shown "that factors exist which outweigh the desirability of requiring compliance . . .", and that, therefore, Southwest must cease and desist from further violation of the above rule.

2. The proceeding is now before the Review Board on exceptions filed by Southwest and WIIC–TV. The Cable Television Bureau and WIIC–TV support the Initial Decision. Oral argument was held before a panel of the Review Board on September 20, 1973. We have reviewed the Initial Decision in light of the exceptions, the replies, the arguments of the parties, and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete, and his conclusions persuasive and adequately supported by the findings; therefore, except as modified herein and in our rulings on the exceptions contained in the attached Appendix, the Initial Decision is adopted. However, we will address ourselves briefly to appellant's major arguments.

3. Southwest contends that the scope of the hearing was unduly restricted by the Presiding Judge and that it should have been allowed to show, among other things, that the rule was not valid, whether WIIC–TV demanded nonduplication on other systems, why WIIC–TV waited over two years to ask for an Order to Show Cause after it first could have done so and any other evidence relevant to a showing that good cause existed for a denial of the cease and desist order. In sum, Southwest argues that it was "entitled to submit *whatever evidence was relevant* to persuade the Commission that good cause existed for a denial of the cease and desist order" [emphasis supplied]. In the Board's opinion, Southwest's interpretation of the scope of a show cause proceeding, in the circumstances of this case, is simply broader than established precedent. Thus, in *H & B American Cablevision Co.*, 25 FCC 2d 75, 77, 19 RR 2d 855, 857 (1970), the Commission stated, "[w]e do not reconsider matters in a show cause proceeding which have already been raised in a former waiver proceeding." Later, in *Touchet Valley Television, Inc.*, 27 FCC 2d 719, 721–2, 21 RR 2d 63, 66–7 (1971), the Commission went on to explain that, "[i]f a CATV operator believes that carriage and nonduplication protection is not possible or not warranted in a particular case, we expect him to make application for a waiver of Section 74.1103 [now Rule 76.91] and to present all available data to support his position in the waiver proceeding. Thus, in most instances there should be no reason to retry the question of waiver in the show cause proceeding." However, the Commission did temper this somewhat by concluding that if the Administrative Law Judge "finds that the adduction of engineering data or other evidence is necessary in order to determine whether the issuance of a cease and desist order is in the public interest, the evidence should be received and considered." In sum, therefore, the general rule is that no evidence may be presented at the show cause hearing which was or could have been presented at the waiver proceeding, with the exceptions to this being very narrow, as seen in the *H & B* and *Touchet*

cases.[2] Accordingly, because all of the matters raised by Southwest, and the corresponding offers of proof, with the exception of the financial data which became available after denial of the waiver, either were or could have been presented at the waiver proceeding, the Board agree with the Presiding Judge's rulings in this regard. Moreover, aside from the procedural deficiency, the substance of Southwest's specific arguments have been previously considered by the Commission and/or the Courts in other proceedings and were there rejected as inadequate grounds for not complying with the nonduplication requirements of the Commission's Rules.

4. Southwest's "basic position" on appeal is that the nonduplication rule violates Sections 1, 301, 303(g), 307(b) and 605 of the Communications Act of 1934, as amended. In support of this position, Southwest argues that the rule arbitrarily controls reception, which is beyond the authority of the Commission in that anyone within the range of a properly operating transmission facility can receive that signal and the Commission "has no power to control the means whereby it is received . . .". Also, argues Southwest, any attempt to restrict such reception of signals received off-the-air is an unlawful discrimination against the CATV service and violates the First and Fourteenth Amendments to the U.S. Constitution. These arguments have been raised and rejected in the past. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court upheld the basic authority of the Commission to regulate CATV systems under the Communications Act. Then, in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), the Supreme Court held that the Commission's Rules requiring CATV program origination were permissible and, in general, that CATV regulation by the Commission was not limited to avoidance of adverse effects on broadcasting. More recently, in *Winchester TV Cable Co.* v. *FCC*, 462 F.2d 115 (4th Cir. 1972); *cert. denied* November 13, 1972, the Fourth Circuit Court of Appeals, after quoting with approval language from *Wheeling Antenna Co.* v. *United States*, 391 F.2d 179, 183 (4th Cir. 1968), stating that the nonduplication rule is "a fair adjustment and accommodation of conflicting claims to first place in the public interest . . . " and further agreeing with *Wheeling's* assertion that "the Commission's efforts to assure that the roles of CATV and television remained complementary were in keeping with the Communications Act of 1934 . . ." [footnote omitted], specifically rejected the contention that the nonduplication rule violated Sections 1 and 307(b) of the Communications Act.

5. Southwest contends further that the nonduplication rule is in "direct contrast" to the Commission's Report and Order, *Network Television Programs*, Docket No. 16041, 26 FCC 2d 772, 20 RR 2d 1687 (1970),[3] which Southwest interprets as forcing "simultaneous duplication of network signals over large areas and populations." Under present CATV Rule 76.91, Southwest maintains, duplication

[2] The rationale behind these holdings is clear. To permit matters to be raised at the show cause proceeding which were or could have been raised at the waiver proceeding would result in a wasteful duplication of effort and impede the efficiency of Commission processes.

[3] In Docket No. 16041 the Commission considered the merits of rules designed to encourage major networks to make their services available to small market stations and to independent UHF stations because often these stations are the only ones in the community and their survival is clearly in the public interest scheme of local outlets.

is restricted to small areas and populations and therefore is in violation of the 5th and 14th Amendments because it denies the advantages of duplication which are granted to television broadcasters. Clearly, this claim must be rejected on the basis of the *Winchester* case, *supra*, as well as other existing precedents. In *Winchester*, the Court stated that it "need not decide whether this difference [that broadcasters function as transmitters of signals while CATV facilitates the reception of signals] provides a rational basis for the Commission's refusal to apply the same nonduplication policies to both CATV and to broadcasters. The Commission has not yet adopted any rule requiring a network to duplicate its programs in [the systems' communities] through multiple affiliations. Nor do the CATV systems allege that Docket 16041, absent a rule, has coerced duplication in areas they serve. At best, as the Commission observed, the constitutional attack mounted by [appellants] is premature." 462 F.2d 118.[4]

6. The precedents are also contrary to Southwest's contention that the Commission has abdicated its responsibility by promulgating a rule which leaves it to the local TV station to determine which CATV systems will be required to grant nonduplication protection. This contention at its base, is again a challenge to the priorities and adjustments to the "conflicting claims to first place in the public interest," which the Commission has decided and the courts have approved. *Wheeling Antenna Co.* v. *U.S.*, 391 F.2d at 183; and *Winchester TV Cable Co.* v. *FCC*, *supra*. It is also to be noted that the courts have approved Commission adjudication "by reference to a pertinent general rule . . . ", *Wheeling*, 391 F.2d at 182, and have also approved the Commission's efforts to protect the economic viability of local stations—which is a wholly legitimate function of the Commission's statutory duty. *Wheeling*, *supra*. Moreover, the TV station's determinations in this regard are restricted to narrowly defined signal reception areas on a priority system that has been judicially upheld, and with the safeguard of appeal to the Commission by a waiver request prior to initiation of nonduplication protection.

7. Commission precedent also rebuts Southwest's claim that WHC–TV must show in this proceeding that it meets the needs and serves the local interests of California, Pennsylvania. In *Shen-Heights TV Association*, 11 FCC 2d 814, 818, 12 RR 2d 407, 417 (1968), the Commission stated that it wanted to stress that:

> . . . it remains the good faith reasonable judgment of the licensee as to what programming should be presented, taking into account the many demands upon him for broadcast time and the relative importance of such demands. What is required here is only that in making his judgment, the licensee will have appropriately surveyed the needs of these communities in his service area.

Later, in response to a similar allegation made by another CATV system, the Commission, in *Auburn Cablevision, Inc.*, 21 FCC 2d 353, 354, 18 RR 2d 427, 428 (1970), stated that "a determination that a

[4] In responding to this argument, the Commission stated that "far from being inconsistent the general policy expressed in Docket 16041 and the specific provisions of [the CATV nonduplication rule] are both in fact reflections of the same ultimate general goal: providing the public with the greatest number of broadcast voices representing the widest possible diversity of sources. Any arguable distinctions between Docket 16041 and the nonduplication rule simply reflect the different directions from which this objective is approached in two very different contexts." *Television Antenna Cable, Inc.*, 30 FCC 2d 610, 612, 22 RR 2d 391, 393 (1971).

television broadcast station adequately serves as an outlet for local self-expression is part of the Commission's licensing and renewal procedures, and such a determination has been made with regard to [the requesting TV station]. It would not seem appropriate to attack this determination collaterally in a program exclusivity waiver petition." See also *Pittsfield-Dalton TV Cable*, 33 FCC 2d 383, 23 RR 2d 569 (1972).[5] The Board perceives no reason for not applying the *Auburn* rationale to this proceeding.

8. Nor does the Board believe that Southwest's claim of financial hardship justifies waiver in this proceeding. The Presiding Judge limited such a showing concerning the financial aspects to the period subsequent to 1968 because the Commission, in denying the waiver request, had specifically rejected such evidence with regard to the period prior to 1968. It (the prior period) was therefore quite properly precluded from the show cause proceeding. See *Touchet Valley*, *supra*, and the discussion at paragraph 3. The record evidence, moreover, does not support Southwest's contentions in this regard. While Southwest's executives have never drawn compensation, and it has sustained cumulative losses totalling $65,257 through the end of 1971, the pattern of losses has been decreasing and, except for a non-recurring expense, Southwest would have shown a 1971 profit of $6,391. Thus, Southwest's claim that the system's capital will be exhausted without replacing it is substantially rebutted.[6] Moreover, the Commission has frequently stated that "the cost of equipment and labor necessary to provide program exclusivity is not an adequate basis for relieving a CATV operator of its obligation to provide program exclusivity," *e.g.*, *Southwest Pennsylvania Cable TV, Inc.*, 19 FCC 2d 989, 990, 17 RR 2d 513, 514 (1969). Therefore, it would appear that financial hardship, if any, is outweighed by the overriding public interest considerations which form the basis for the nonduplication rule.

9. Another of Southwest's contentions clearly rebutted by established Commission precedent relates to the evidence Southwest attempted to introduce as to whether or not WIIC–TV requested program exclusivity from other CATV systems in its coverage area. *Community TV Corporation*, 17 FCC 2d 940, 16 RR 2d 397 (1969), which was correctly relied upon by the Presiding Judge as a basis for refusing to accept such evidence, specifically states that "the Commission's CATV rules are of general application and their enforcement is not contingent upon television stations uniformly asserting their rights." See also *Ohio Valley Cable Corporation*, 24 FCC 2d 448 (1970); and *Duvall Radio Sales & Service*, 20 FCC 2d 733 (1969). Finally, the Board, as did the Judge, must reject Southwest's allegations of "laches" on the part of WIIC–TV, as well as the claim that inquiry at the hearing should have been permitted as to the reasons for the two-year delay between Southwest's waiver request and WIIC–TV's request for an Order to Show Cause. The Commission has

[5] *Stone v. FCC*, 466 F.2d 316, 328, —— U.S. App. D.C. —— (1972), relied upon by Southwest is distinguishable. That case involved a challenge to a TV station's renewal application, and the Court stated that "the scope of FCC review remains whether or not the licensee has reasonably exercised its discretion."

[6] Also, much of this information either was or could have been before the Commission when it denied Southwest's waiver request and therefore should have been excluded from the show cause proceeding barring exceptional circumstances not present here.

specifically stated that "the Commission's rules [re nonduplication] do not require that a request for program exclusivity be made at any specific time, and it does not appear that [the CATV system] has been injured by [the TV station's] delay." *Massillon Cable TV, Inc.*, 21 FCC 2d 188, 189, 18 RR 2d 241, 242 (1970). In the Board's opinion, absent exceptional circumstances not present here, so long as there is no formal withdrawal of the station's request for the cease and desist order, any delay in making the initial request is without decisional significance. Moreover, here the delay was apparently occasioned, at least in part, by the attempt to work out an agreement as to the request. Finally, Southwest has alleged no injury from the delay.

10. Accordingly, IT IS ORDERED, That Southwest Pennsylvania Cable TV, Inc., SHALL CEASE and DESIST from further violation of Section 76.91 of the Commission's Rules as specified in the text of this Decision.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON, *Member, Review Board.*

APPENDIX

Rulings on Exceptions of Southwest Pennsylvania Cable TV, Inc.

Exception No.	*Ruling*
1, 3, 4, 13, 14, 15, 17, 19, 20, 24, 25	Denied. See paragraphs 3 and 9 of this Decision.
2, 16, 26	Denied. See paragraphs 3 and 7 of this Decision.
5	Denied. Concise reasons for denial are, in fact, given to each of the arguments presented by Southwest. In addition, the procedure of ruling on requests for waiver on the basis of written pleadings and without a formal hearing has been fully approved by the courts. See *e.g.*, *Winchester TV Cable Co.* v. *FCC*, 462 F.2d 115 (4th Cir. 1972), *cert. denied* November 13, 1972; *Wheeling Antenna Co., Inc.* v. *U.S.*, 391 F.2d 179 (4th Cir. 1968); and *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964). Further, Southwest did not seek reconsideration or judicial review of the denial of waiver.
6	Denied. However, see paragraph 7 of this Decision.
7, 8	Denied as being without decisional significance and outside the scope of the issues at the Show Cause proceeding. See Paragraphs 3 and 8 of this Decision.
9, 10, 28	Denied. See paragraph 8 of this Decision.
11, 12	Denied. The matters contained in this offer of proof are either without decisional significance or outside the scope of the issues of the Show Cause proceeding. See paragraphs 3, 8 and 9 of this Decision.
18	Denied. The Presiding Judge's ruling was correct. See also paragraph 3 of this Decision.
21	Denied as being without decisional significance. See paragraphs 3 and 7 of this Decision and ruling on Exception 6.
22	Denied as being without decisional significance. See also paragraphs 3, 4 and 9 of this Decision.
23, 29, 30	Denied for the reasons stated in the whole of this Decision.
27	Denied. The Presiding Judge's words are taken out of context. See pertinent paragraphs of this Decision.

Ruling on Exception of WIIC–TV Corp.

1	Denied. The requested ruling is without decisional significance. See paragraphs 3 and 7 of this Decision.

F.C.C. 72D-65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST: SOUTHWEST PENNSYLVANIA CABLE TV, INC., CALIFORNIA, PA.	Docket No. 19464 SR-87113

APPEARANCES

Frederick W. Ford and *Lee G. Lovett* on behalf of Southwest Pennsylvania Cable TV, Inc.; *Daniel M. Redmond, John Rafter* and *Richard D. Marks* (Dow, Lohnes & Albertson) on behalf of WIIC-TV Corporation; and *Stephen R. Ross* and *Angela B. Green* on behalf of Chief, Cable Television Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHESTER F. NAUMOWICZ, JR.

(Issued September 28, 1972; Released October 4, 1972)

PRELIMINARY STATEMENT

1. By Order released March 24, 1972, the Commission ordered Southwest Pennsylvania Cable TV, Inc. to show cause why it should not be ordered to cease and desist from violation of Rule 74.1103(e). Conferences and hearings were held on various dates between May 2 and July 21, 1972. The record was finally closed by the presiding Judge's order released September 19, 1972. The filing of Proposed and Reply findings of fact was concluded by September 25, 1972.

FINDINGS OF FACT

2. Southwest operates its CATV system in the Borough of California, Washington County, Pennsylvania, and in the surrounding Boroughs of West Brownsville, Coal Center, Roscoe, Stockdale and Allenport. A total of some 3,500 homes are within the service area, of which some 1,900 are subscribers. The system has 12-channel capacity, but actually provides only 9 channels of reception.

3. Three of the nine channels carry the programming of NBC affiliates. Of these WIIC-TV, Pittsburgh, Pennsylvania, places a predicted principal community signal over California; WTRF-TV, Wheeling, West Virginia, places a predicted Grade A signal over California; and WJAC-TV, Johnstown, Pennsylvania, places a predicted Grade B signal over California. Each of these three stations has been carried on the system since its inception in November, 1965.

4. On March 29, 1969 WIIC–TV Corporation demanded non-duplication protection on the Southwest system pursuant to Rule 74.1103 (e). Since it placed the most preferred category of signal over California, it was entitled to such protection by the terms of the rule. Southwest responded on April 7, 1969 by filing with the Commission a petition for waiver of Rule 74.1103. On October 1, 1969, the Commission issued an order denying the requested waiver. Although negotiations continued between WIIC–TV and Southwest, WIIC–TV did not withdraw its demand for non-duplication protection and Southwest did not cease delivering the duplicating network signals to its subscribers.

5. On August 23, 1971 WIIC–TV petitioned the Commission for an Order to Show Cause why Southwest should not be ordered to cease and desist from continuing violation of Rule 74.1103. On March 24, 1972 the instant Show Cause Order was issued.

6. Southwest does not contest that it has failed to afford WIIC–TV non-duplication protection from lower priority competing network signals. Rather, it contends that the circumstances are such as to render it unlawful and/or inequitable to enforce the rule.

7. First, Southwest undertook to show that WIIC–TV was not demanding non-duplication protection on all CATV systems on which it would be entitled to that protection. Southwest was not permitted discovery in this area, nor was its evidence received for the reason that the Commission has heretofore considered this factor and found that it furnishes no basis for non-enforcement of the non-duplication rule, *Community TV Corp.*, 17 FCC 2d 940. However, Southwest was advised during the hearing that if it could show that WIIC–TV was not demanding non-duplication protection from systems with which Southwest was in direct house-to-house competition its evidence would be received in support of an argument that it would be inequitable to hold it to a more stringent standard than was being demanded from its direct competitor. Southwest did not proffer such evidence, although it did offer to show that WIIC–TV was not demanding non-duplication protection in nearby communities.[1]

8. Southwest next introduced evidence intended to show that WIIC–TV does not present programming designed specifically to serve the needs and interests of the community of California, Pennsylvania. To this end it demonstrated that WIIC–TV did not contact any community leaders in California during its most recent Suburban survey; that only two telephone calls were completed to residents of California in the telephone portion of the survey; and that only two post cards were sent to residents of California, neither of which was answered. With respect to the actual programming of WIIC–TV, only two incidents dealing directly with California were established: a news item on May 28, 1972; and the appearance of local students on a March 6, 1972 show. On the other hand the record indicates that neither WTRF–TV nor WJAC–TV devotes a greater degree of attention to the specific needs and interests of California.

[1] Mere proximity of CATV systems does not put them into competition since a householder cannot avail himself of even next door service when his house is not within the CATV system's franchise area. A somewhat different problem might be presented if that householder intervened to complain that the Commission is permitting its licensees to so conduct themselves that he is being denied service available to his neighbor for no apparent reason other than the whim of the licensee.

9. Finally, Southwest contends that it would be economically unjust to compel it to undertake the expense of affording WIIC–TV non-duplication protection. Although the system's executives have never drawn compensation, it has never shown a profit; and cumulative losses totalled $65,257 through the end of year 1971. However, the pattern has been one of decreasing losses each year and in 1971 a profit of $6,391 would have been shown but for a non-recurring expense.

CONCLUSIONS

10. Since the receipt of WIIC–TV's non-duplication demand of March 29, 1969 Southwest has been in knowing and deliberate violation of Rule 74.1103. The public interest requires that it be ordered to cease and desist from such violation unless it has been shown that factors exist which outweigh the desirability of requiring compliance with the rule. This record contains no such showing.

11. The Commission has heretofore rejected the concept that a Broadcaster who fails to claim non-duplication protection on every CATV system on which it might make such claim thereby waives its right to advance a claim on any system. Southwest has offered no evidence of special circumstances which would warrant a different procedure in this instance.

12. Its contention that WIIC–TV does not serve or attempt to serve, as a local outlet for California is factually accurate, but without decisional significance. Firstly, the purpose of the non-duplication rule is to protect television stations from outside competition within their natural markets. It is not directly concerned with the objective of providing local outlets for smaller communities within the station's contours. Secondly, the programming for which WIIC–TV is entitled to non-duplication is network programming which is, of course, non-local. If Southwest believes that the non-network programming of WTRF–TV or WJAC–TV in some way better serves the needs of California, it is free to present such programming exactly as it has heretofore. The only programming which it must delete will be the duplicating network signals being simultaneously transmitted by the three NBC affiliates.

13. Finally, neither Southwest's evidence nor its proffers make out a case of financial hardship so severe as to justify non-enforcement of the rule. The system has not yet been profitable, but its situation has been improving. The additional costs of providing non-duplication protection, which must be regarded as a normal expense incident to CATV operation, are unlikely to prove an insurmountable barrier to eventual profitability.

Accordingly, IT IS ORDERED, That at the expiration of the time provided by rule for the filing of exceptions to this Initial Decision, or, if exceptions are filed or the Commission reviews the Initial Decision on its own motion, within the time set by the Commission, Southwest Pennsylvania Cable TV, Inc. CEASE and DESIST from further violation of Section 74.1103(e) of the Commission's Rules as specified in the text of this Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, Jr., *Administrative Law Judge.*

F.C.C. 73-1100

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2, 89 AND 91 OF THE COMMISSION'S RULES AND REGULATIONS TO ALLOCATE TO THE SPECIAL INDUSTRIAL RADIO SERVICE THE FREQUENCIES 151.490 AND 157.725 MHz	Docket No. 19753 RM-2055

REPORT AND ORDER

(Adopted October 25, 1973; Released October 30, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On June 5, 1973, the Commission released a Notice of Proposed Rule Making in the above entitled matter, which was published in the Federal Register of June 22, 1973, (41 FCC 2d 219). Comments were filed by Special Industrial Radio Service Association, Inc. (SIRSA) and Forestry-Conservation Communications Association (FCCA). Reply comments were filed by the International Taxicab Association (ITA).

2. The Notice of Proposed Rule Making sought comments on our proposal to allocate the bandedge frequency 151.490 MHz exclusively to the Special Industrial Radio Service. In that action, we denied FCCA's proposal to allocate this frequency for shared use by Special Industrial and Forestry Conservation licensees because FCCA had not supported its request. We also denied alternative proposals by SIRSA and ITA to allocate the frequency 157.725 MHz, respectively, to the Special Industrial and to the Taxicab Radio Services.

3. The comments advance substantially the same positions the parties had taken in the earlier phases of this proceeding. Thus, SIRSA urged us to allocate to Special Industrial the frequency 157.725 MHz as well as the frequency 151.490 MHz, and ITA renewed its request that the frequency 157.725 MHz together with another bandedge frequency 152.465, be allocated to the Taxicab Radio Service. However, neither SIRSA nor ITA have offered either information or arguments in support of their proposal not previously considered and, therefore, their requests with respect to the frequency 157.725 MHz are denied.

4. On the other hand, FCCA has submitted additional information which we believe supports its request for shared use of the frequency 151.490 MHz by Forestry-Conservation licensees. The data submitted by FCCA indicates that forestry and conservation agencies in the Pacific Coast States of California, Oregon, and Washington, and to a lesser extent in other parts of the country, have a need for and can make good use of an additional channel in this frequency range. Fur-

ther, FCCA and SIRSA have the mechanism for and are willing to perform the necessary interservice coordination required for use of the bandedge frequency with minimum interference problems. Accordingly, we will modify our original proposal and make the frequency 151.490 MHz available both in the Special Industrial and in the Forestry-Conservation Radio Services.

5. In view of the foregoing it appears that the public interest would be served by adopting the Rule amendments set forth in the Appendix. Accordingly, IT IS ORDERED, That pursuant to authority contained in Section 303(c), (e) and (f) of the Communications Act of 1934, as amended, Parts 2, 89, and 91 of the Commission's Rules and Regulations are amended effective December 7, 1973. IT IS FURTHER ORDERED, That this proceeding is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

I. Part 2 of the Commission's Rules is amended as follows:
§ 2.106 Table of Frequency Allocations

Worldwide		Region 2		United States		Federal Communications Commission				
Band (MHz)	Service	Band (MHz)	Service	Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of services
1	2	3	4	5	6	7	8	9	10	11
•		•		•		•	•		•	•
						150.98 to 151.4825.	Land mobile	Base. Land mobile.	----------	Public safety (NG51).
						151.4825 to 151.4975.	Land mobile	Base. Land mobile.	----------	Industrial and public safety (NG51).
						151.4975 to 152.	Land mobile	Base. Land mobile.	----------	Industrial.
•		•		•		•	•		•	•
•		•		•		•	•		•	•

II. Section 89.459 of the Commission's Rules is amended by the addition of the frequency 151.490 MHz to the frequency table, and a new limitation (17) is added to paragraph (e) to read as follows:

§ 89.459 frequencies available to the Forestry Conservation Radio Service.

* * * * * * *

(d) * * *

Frequency or band—MHz	Class of station(s)	Limitations
* * * * * * *		
151.475	do	16
151.490	Base or mobile	16, 17
159.225	do	
* * * * * * *		

* * * * * * *

(e) * * *

(17) This frequency is shared with the Special Industrial Radio Service and interservice coordination is required.

* * * * * * *

III. Section 91.504 of the Commission's Rules is amended by the addition of the frequency 151.490 MHz to the frequency table, and two new limitations (37,38) are added to paragraph (b) to read as follows:

§ 91.504 Frequencies Available

(a) * * *

Frequency or band—MHz	Class of stations	General reference	Limitations
* * * * * * *			
75.98	do	do	3
151.490	Base or mobile	Permanent use	11, 37, 38
151.505	do	Itinerant	12
* * * * * * *			

(b) * * *

(37) This frequency is not available to stations in Puerto Rico or the Virgin Islands.

(38) This frequency is shared with the Forestry Conservation Radio Service and interservice coordination is required.

F.C.C. 73-1074

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSES OF WESTERN CONNECTICUT BROADCASTING CO. For Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM Stamford, Conn.	Docket No. 19043

APPEARANCES

Thomas H. Wall, B. Dwight Perry, and *Susanne Meyer*, on behalf of Western Connecticut Broadcasting Company; and *Gerald M. Zuckerman* and *Katherine Savers McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.[1]

DECISION

(Adopted October 17, 1973; Released November 7, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER JOHNSON JOINS; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. On October 8, 1970, the Commission directed Western Connecticut Broadcasting Corporation (Western) to show cause why its licenses for stations WSTC and WSTC-FM, Stamford, Connecticut should not be revoked (FCC 70-1093). The Commission further stated that, if it was determined that Western's licenses should not be revoked, the Administrative Law Judge should then decide whether a monetary forfeiture should be imposed on Western.

2. The Commission designated issues to determine whether Western had censored political broadcasts, had failed to afford equal opportunities to all political candidates for the same office, had violated certain record keeping and logging requirements of the Commission's rules, and had misrepresented facts to the Commission, and ultimately whether Western possesses the requisite qualifications to remain a licensee. Subsequently, the Review Board added an issue to determine whether the station's programming had been meritorious (26 FCC 2d 1019). On June 9, 1971 (FCC 71-603), the Commission denied Western's December 7, 1970, Petition for Reconsideration of the Show Cause Order, in which Western contended that a hearing was unnecessary but admitted that violations of the Communications Act and the Commission's Rules warranted a monetary forfeiture.

[1] Melvin M. Dichter appeared on behalf of Julian Schwartz, a witness in this proceeding.

3. Hearings were held in October and December of 1971; and on August 4, 1972, Administrative Law Judge Isadore Honig released an Initial Decision in which he concluded that Western had illegally censored political broadcasts, had failed to provide equal opportunities to political candidates, and had committed logging and record keeping violations. With regard to the misrepresentation issue, the Judge concluded that although principals of Western had made statements that did not conform to what he found to be the facts, the statements were not deliberate misrepresentations. He also determined that the programming of WSTC had been meritorious. He concluded that, although Western had been derelict in carrying out its responsibilities, it was qualified to continue to operate the stations; and that revocation was unwarranted.[2] For willful or repeated violations of the Act and the Commission's Rules, he assessed the maximum monetary forfeiture of $10,000. The Broadcast Bureau filed exceptions to the Initial Decision and argues in essence that the misrepresentations made by Western's principals were deliberate and that Western lacks the qualifications to be a Commission licensee. Western filed limited exceptions; basically it supports the Initial Decision.

4. The findings of fact of the Judge are substantially correct, and we adopt them except as they are modified in this decision and in our rulings on exceptions. We also adopt the Judge's conclusion that there were violations of the censorship and equal opportunities provisions of Section 315, although we disagree with two instances in which the Judge concluded that the equal opportunities provision had been violated. No exceptions were taken on the issues of logging and maintenance of public files. We have been seriously troubled by the evidence on the issue of misrepresentations; but we have reached the conclusion, as did the Judge, that there were no deliberate misrepresentations.

5. Briefly summarized, the events out of which this case arose are as follows: During the 1969 Democratic primary and the general election campaigns for Mayor of Stamford, Connecticut, the general manager of the licensee (Julian Schwartz) had required all the candidates, except the Republican candidate for mayor, to submit for review advance scripts of their paid political announcements and programs which they wanted to broadcast over WSTC.[3] In addition on six different occasions Schwartz deleted from the scripts of the Democratic candidate for Mayor material which Schwartz deemed objectionable. Schwartz also deleted material from three scripts of the Fusion Party candidate. On the few occasions when the candidates vigorously opposed the deletions, Schwartz told them the changes would be made or the candidates would not go on the air.

6. The deletions were required by Schwartz in order to preserve the "image" of the stations, which were described as his "shadows" and which he had strived for almost 25 years to build into respected

[2] Western's license term expired on April 1, 1972, and Western continues to operate pursuant to Section 307(a) of the Communications Act while its renewal application is being held in abeyance.

[3] The programming of WSTC is duplicated on WSTC–FM during those times relevant to the designated issues. Reference to WSTC is therefore intended to refer to both stations

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community voices.[4] (Pet. for Reconsideration, para. 14). The standard which Schwartz used in determining whether deletions were necessary was that of "good taste" and the arbiter of good taste was Schwartz. Material was not in good taste if it involved name-calling, a person's reputation, or an exaggeration, or seemed otherwise objectionable. Most of the material which Schwartz deleted from the candidates' scripts consisted of arguments and allegations which one would expect to be made in any political campaign.

7. The President, Treasurer, and 51.6% owner of Western (Kingsley Gillespie) knew that Schwartz was requiring the submission of scripts. Both believed mistakenly that the requirement of prior submission of scripts was permissible. There was a modicum of substance for the erroneous belief that the submission of scripts could be required. The Catechism issued by the National Association of Broadcasters in 1968, which Schwartz testified he had read, gave him the incorrect impression that an advance script could be required because it was permissible to try to persuade candidates to delete obscene or defamatory material. Nevertheless, the Commission's Primer published May 4, 1966, entitled "Use of Broadcast Facilities by Candidates for Public Office" (31 Fed. Reg. 6660) plainly prohibited the prior submission of scripts (VII, Q. and A. 7). Schwartz had "looked through" the Commission's 1966 Primer several times (Tr. 142) and had read it prior to the 1969 campaign (Tr. 144) although how long before the campaign is not a matter of record. The licensee had an obligation to be aware of the Commission's implementation of the requirements of law and, had Schwartz been performing his duties properly, he would have sought advice with respect to what should have seemed an about-face in the Commission's position on prior submission of scripts. He chose to proceed without advice. Gillespie's reliance was misplaced with respect to Schwartz's knowledge of the requirement of law; but Gillespie chose to rely on Schwartz rather than seeking advice of counsel or involving himself in the question of conformity of station policy with the requirements of Section 315. He approved the requirement of prior submission and thus imperiled the license.

8. We believe also, as did the Judge, that the deletions made or required by Schwartz were done willfully. Both Schwartz and Gillespie testified that they understood anything beyond persuasion was not permitted. Gillespie did not know that Schwartz was deleting material; but contrary to Western's argument, the licensee must bear responsibility for Schwartz's willful misconduct because Gillespie failed to exercise adequate supervision over his general manager. The record shows Gillespie repeatedly reminded Schwartz about treating the candidates equally; in contrast, Gillespie and Schwartz apparently had not had a discussion with respect to censorship since the late 1940s. Gillespie testified that he had told Schwartz in the late 1940s, and they had an understanding, that Schwartz "has a right to look at the scripts and suggest to the candidate what was not in good taste, but he had no power to force [the candidate] to change it." Gillespie con-

[4] The record reflects that Schwartz was diligent and sincere in trying to make the station a good operation in terms of programming. He had worked hard to build up the stations. Even at the age of 68, he was at the station regularly seven days a week and rarely took a vacation.

sidered the understanding one "that didn't need reminding of" (Tr. 73). On such an important matter, the prolonged lack of scrutiny or specific reminder certainly constitutes a lack of supervision by the licensee. The licensee cannot escape culpability for its general manager's deliberate violations of the law.

9. The Judge also correctly concluded that Schwartz's review and censorship of the scripts of two of the three candidates in the general election not only was a violation of the prohibition on censorship, but also constituted a violation of the equal opportunities provision of Section 315. We think this is a correct application of the law in this case. The statute requires equal treatment and prohibits censorship. Here the censorship, which in itself was illegal, had the effect of favoring one candidate, which also was illegal.

10. We agree with Western, however, that the Judge incorrectly concluded that the equal opportunities provision was violated when the licensee invoked its policy against back-to-back political ads and offered the Fusion Party candidate time at 6:55 p.m. when his requested time at 6:29 p.m. had already been sold to the Republicans. The 6:29 time was adjacent to the local news; the 6:55 time was adjacent to the national news. The Judge reasoned that the licensee should have foregone its policy against back-to-back political ads as was done subsequently on the night before election. We think that Schwartz's policy was a reasonable one, that Schwartz complied with Section 315 by providing reasonably comparable time, and that it was not necessary to waive the station's policy.

11. Schwartz's policy of requiring a minimum separation between announcements of opposing candidates was adopted to assure that each announcement would have maximum effect. Hence, it was not improper for Schwartz, in offering the Fusion Party candidate time slots for his broadcast, to adhere to the minimum separation policy, as long as the time offered was reasonably comparable to that afforded the Republicans. The 6:55 time offered was as close to the local news as the separation policy would permit. Moreover, we do not believe that Schwartz was obliged to waive the separation policy in order to afford time closer to the 6:30 local news. A waiver of the policy when the campaign for the general election was just beginning would have required the granting of subsequent waivers to other candidates and would have nullified the station's separation policy. The Broadcast Bureau notes that Schwartz did waive the policy on election eve in order to accommodate all the candidates' requests for time. We believe, however, that the situations are readily distinguishable. At the beginning of the general election campaign, it was possible to offer the Fusion Party candidate a choice of several time slots and still maintain the separation policy. On election eve many of the announcements could not have been broadcast at all without a waiver of the policy. As the licensee explained, the policy was lifted the night before the election in order to afford all candidates time at the crucial point in the election.

12. We also agree with Western that the Judge incorrectly concluded that the equal opportunities provision was violated by Schwartz's permitting the supporters of the Republican candidate to have political announcements read by the regular announcer during a

musical program, and by the announcer's pronunciation of the names of the sponsors and their region of origin in Italian. Schwartz had previously forbidden the Fusion Party candidate to present a question and answer program in Italian or to have the announcer for the program participate as the questioner for the same program in English. Schwartz's reason was that to do so would have violated the station's policies against foreign language programs and against permitting employees to participate in political programs unless all candidates were on the program. Western argues that Section 315 is inapplicable because the Republican candidate did not himself appear on the program. We agree. Use of the facilities by supporters of a candidate does not create the obligation of providing equal opportunities.[5] We therefore must conclude that Western did not violate the equal opportunities provision of Section 315 when it allowed its employee to read political announcements and to use the Italian pronunciation of names and places on a special musical program in support of the Republican candidate.

13. In making his determinations on violations of Section 315, the Judge did not consider the testimony of one Sheldon, who in 1968 had been a candidate for offices other than mayor. The Judge ruled that the testimony of Sheldon as to censorship of his scripts in 1968 and as to his complaints to Schwartz and Gillespie could be used only in connection with the charges of misrepresentation by Schwartz and Gillespie. The Judge based his ruling on the fact that the bill of particulars, prepared by the Broadcast Bureau after the designation for hearing, alleged censorship only during the 1969 campaign and did not refer to any 1968 campaign. This ruling is erroneous. First, the scope of the issues is established by the designation order, not the bill of particulars. See *Chronicle Broadcasting Co.*, 20 FCC 2d 33, 39, n. 11. Second, although the 1968 campaigns were not included in the specifications of the bill of particulars, the licensee was advised prior to hearing that Sheldon would be a witness; the licensee knew that Sheldon had been a candidate for public office in 1968 and had used Western's facilities for political broadcasts. Moreover, and most important, the licensee knew on September 16, 1971, a month prior to hearing (which began October 19, 1971), that Sheldon had asserted that he had complained of censorship. (Western Ex. 2, p. 5)[6] Thus, the licensee can reasonably be said to have had notice that censorship in 1968 was at issue and to have had an opportunity to meet the charge. Sheldon's testimony as to censorship is a matter of record; the judge accepted Sheldon's testimony as truthful; and we conclude on this record that the licensee was also guilty of censorship in 1968.

14. One more element with respect to the Section 315 violations must be decided: whether Schwartz was politically motivated. Because Schwartz's actions favored the Republican candidate, the Bureau ex-

[5] The more flexible Fairness Doctrine would apply (see the last sentence of Section 315(a)) and would require an examination of the opportunities the licensee afforded for discussion of the various candidacies. The Show Cause Order did not allege, the Bureau does not claim, and the record would not support a charge that the licensee violated the Fairness Doctrine in its coverage of the candidates and issues in the campaign. For application of the Fairness Doctrine in instances of the appearance of supporters of a candidate for political office, see the Commission's letter of June 3, 1970, to Nicholas Zapple, Communications Counsel, Committee on Commerce, 23 FCC 2d 707.

[6] In a letter dated September 28, 1971, to the Commission, Gillespie stated that he first learned of Sheldon's allegations on September 16, 1971.

cepts to the conclusion that Schwartz was entirely lacking in political motivation. The censorship of the other candidates did in fact favor the Republican candidate in violation of Section 315; the Judge so found; and we agree. The Bureau, however, specifically disclaims a charge that the censorship was politically motivated but argues only that favoritism to the Republican candidate was politically motivated. Schwartz explained that he did not review the Republican's scripts because he felt from other utterances of the candidate that his script would not offend "good taste" (Tr. 213); an employee of the station independently and on his own time was assisting the Republican candidate, and Schwartz knew that the employee understood the station's standards (Tr. 212); the scripts for the Republican were prepared professionally with the assistance of a man whom Schwartz knew personally and in whom he had complete confidence (Affidavit of Julian Schwartz dated December 4, 1970 accompanying Western's Petition for Reconsideration.) We accept these explanations as consistent with Schwartz's effort to maintain the station's image. As to other actions of Schwartz which the Bureau alleges favored he Republican there was no unfairness in the adherence to the station's separation policy. (See para. 11, *supra.*) There was a reasonable distinction between letting a station employee read political spot announcements during a musical program sponsored by a candidate's supporters (which Schwartz permitted) and letting a station employee read questions which a candidate would answer during an interlude in the musical program (which Schwartz did not permit). There was also a reasonable distinction between the independent participation of one employee in Republican announcements prepared on his own time and at his own choice and Schwartz's denial of the Fusion Party candidate's request to use an employee in a question and answer format during an interlude in the employee's regular musical program. The substance of Schwartz's ordering the station's announcer to use the Italian pronunciation when reading the names of the Republican's supporters and their place of origin is simply not enough to support a conclusion of a plan or intention arising from political bias. And there was no evidence to link the Gillespie-owned newspaper endorsement of the Republican on the Saturday before the election with Schwartz's conduct. Moreover, when the sister of the Democratic candidate complained about a Republican announcement, Schwartz listened to it, found it in bad taste ("name calling"), and took it off the air.[7]

15. The conclusion which has given us the greatest difficulty is that on the issue of misrepresentation. We are seriously troubled with what appear to be gross contradictions between the facts as found by the Judge and the statements made by Schwartz and also with the instance in which the Judge found that Gillespie had engaged in an "inexcusable exaggeration." The Judge concluded that neither Gillespie nor Schwartz had deliberately misrepresented. Although he discredited Schwartz's statements in almost every instance of controversy, the Judge also specifically concluded that Schwartz was trying to tell the truth.

[7] There was no evidence that the Fusion Party candidate ever complained about the good taste of the announcements of the other candidates or that Schwartz would have refused to remove remarks about the Fusion Party candidate which were in "bad taste."

16. We think the evidence and the reasonable inferences are so nearly in balance that resolution either way would leave us with some sense of uncertainty. Nevertheless, a decision must be reached. This is a revocation proceeding; the burden of proof was on the Bureau; and we have therefore given the benefit of the doubt to the licensee.

17. Gillespie was charged with misrepresentations on three occasions. The first was his assertion in an affidavit filed with the December 4, 1970 Petition for Reconsideration that he was "shocked and distressed" to learn that during the 1969 campaign Schwartz was accused of requiring the deletion of spots. The Broadcast Bureau argues that Gillespie was well aware of Schwartz's practice of deleting material from paid political announcements over the candidates' objections and that therefore he could not truly have been shocked when told of the accusations against Schwartz. The Administrative Law Judge held, however, that there was no adequate basis for concluding that Gillespie misrepresented or lacked candor when he claimed to have been shocked. The Judge reasoned: (1) Gillespie was told by Schwartz that he attempted only to persuade the candidates to make changes and that the candidates always acceded to his persuasion; (2) Gillespie never participated in nor witnessed any of the arguments between Schwartz and the candidates; (3) Schwartz himself could not remember having told Gillespie that Schwartz had received complaints concerning his handling of paid political announcements; (4) prior to 1969 there had been no allegations of censorship against Schwartz, whose reputation was of the highest order and upon whom Gillespie relied "totally" (Tr. 101); (5) Gillespie testified that he specifically instructed Schwartz that if a candidate refused to delete material, the candidate must still be allowed to broadcast his political announcement; and finally (6) there is no cogent evidence that in 1968 Ralph Sheldon, in complaining to Gillespie of Schwartz's censorship, stated that Schwartz had made deletions over his objections.[8] We agree with the Judge's conclusion that Gillespie was unaware of Schwartz's actions in deleting material from political candidates' scripts and that Gillespie did not misrepresent to the Commission when he stated that he was shocked when he learned that Schwartz had been accused of such conduct. At the same time we also agree with the Judge that Gillespie did have notice that Schwartz might be engaging in improper conduct with regard to the candidates and their scripts, and that Gillespie's failure to fulfill his responsibility to exercise sufficient oversight of Schwartz to insure that the statute and the Commission's Rules were observed reflects adversely on the licensee.

18. A second statement which was alleged to be a misrepresentation was part of a September 28, 1971, affidavit submitted to the Commission by Gillespie. Gillespie stated that Ralph Sheldon, a candidate for office in 1968, had, prior to September 16, 1971, never complained to Gillespie that Schwartz had censored his paid political announcements broadcast on WSTC. The Judge found that contrary to this statement, on a number of occasions prior to September 16, 1971, Shel-

[8] We also note that Gillespie dismissed the Fusion Party candidate's unreviewed addendum, broadcast at the end of his censored script the night before election, as "something that you expect a candidate to do the night before election." (Tr. 689–690)

don had complained to Gillespie of censorship by Schwartz. The Judge noted, however, that Gillespie had not been inclined to pay serious attention to Sheldon, and concluded that "this and attendant circumstances" suggest that Gillespie in 1971 did not recall Sheldon's complaints of censorship in 1968 and therefore Gillespie did not knowingly and willfully misrepresent when he denied them. The "attendant circumstances" alluded to by the Judge were the following: Sheldon's visits with Gillespie were short—the longest one was five to six minutes and the others occurred when Sheldon unexpectedly arrived at the door of Gillespie's office and conversed with Gillespie for a minute or so; and during these visits, Sheldon engaged in various antics such as reciting poetry and doing push-ups while talking to Gillespie rapidly about a number of subjects. Gillespie's testimony shows that he paid little attention to Sheldon's comments which were interspersed among the antics. It is not improbable on the evidence that Gillespie was being truthful in denying Sheldon had complained. He probably did not remember Sheldon's complaints.

19. The third statement in which Gillespie is alleged to have made misrepresentations to the Commission is contained in Western's Petition for Reconsideration,[9] which stated that Gillespie did not learn of candidates' complaints of censorship until "long after the fact." At the hearing, Gillespie's attention was directed to this statement, and he was asked when Schwartz told him of the addendum to the script broadcast by the Fusion Party candidate the night before election, in which the licensee was charged with censorship. Gillespie stated that Schwartz had informed him of the incident about two or three days after it occurred, and Gillespie further stated that this is what he had reference to in the Petition for Reconsideration. The Administrative Law Judge found, however, that Schwartz had informed Gillespie of the addendum the morning after it was broadcast and concluded that Gillespie's statement in the Petition for Reconsideration was "an inexcusable exaggeration," though not an intentional misrepresentation. Although not without doubt, we believe this conclusion is supportable. First, in these circumstances the time differential between two or three days and the following day is not significant. The significant fact is that Gillespie did not learn of the addendum until after the campaign. Second, an examination of Gillespie's testimony reveals that he was not certain as to precisely when particular events took place, and this was understandable for events which he had not considered significant when they occurred. Thus, Gillespie first testified he was told about the addendum the day after it was broadcast.[10] (Tr. 74) After being shown the Petition for Reconsideration, he said the "long after" meant 2 or 3 days (Tr. 125). Subsequently, he testified that he had given a great deal of thought to refresh his memory on the point and his best recollection was that he learned of the addendum two or three days later (Tr. 688–689).

[9] In an affidavit attached to the Petition for Reconsideration, Gillespie stated that the facts set forth in the Petition were true and correct to the best of his knowledge and belief.

[10] The Judge makes a finding to that effect but does not discuss it specifically in his conclusions.

20. We think it is also relevant to note the circumstances in which this statement was made. The Petition for Reconsideration was filed after issuance of the order to show cause. The licensee was seeking to avoid a hearing by admitting violations of Section 315 and the cited Commission rules and by arguing that it was unaware of the admitted misconduct. Therefore, at the time the Petition was filed, there was reason to emphasize only that Gillespie had not known about the deletions at the time they took place and it would have been unimportant whether he became aware of the complaint a day or a week or a month later. Thus, although he affirmed the truth of the contents of the Petition for Reconsideration, there is no suggestion that the phrase "long after" connoted any more to him at that time than that his knowledge of the charge of censorship was acquired too late to prevent the misconduct. As the Judge observed, however, before affirming such a statement, Gillespie should have searched his memory or checked with Schwartz to refresh or confirm his recollection of the event. His failure to do this and his use of the term "long after" to mean 2 or 3 days, shows an element of irresponsibility. But it does not, we think, show that degree of negligence equatable with deliberateness. We think, therefore, that the Judge correctly absolved Gillespie of deliberately making a misrepresentation.

21. Before reaching his conclusions with respect to Schwartz, the Judge admitted that resolution of the question was difficult. In June 1970 in a statement prepared by FCC investigators on the basis of his answers to questions, Schwartz denied censoring the Fusion Party and Democratic candidates or deleting material from their announcements. In a September 1970 statement to investigators, he again denied censoring the scripts although he had the Independent's script before him. He also denied that he threatened to bar the Fusion Party candidate from the air if he did not remove objectionable material. These statements do not correspond to the facts. In his June 1970 statement Schwartz asserted that the names of a candidate's supporters had been pronounced in Italian without his permission. In fact, he directed the announcer to do so. In a December 1970 affidavit filed as part of the Petition for Reconsideration, Schwartz acknowledged that he might have insisted upon deletions in the scripts of the Fusion Party and Democratic candidates for mayor and that he might have made the deletions a condition of the use of the station's facilities. But he also stated that he had no independent recollection of either making or insisting upon deletions. At the hearing Schwartz consistently maintained that he did not require these candidates to make deletions and that all deletions were made with their concurrence. The facts show these contentions to be untrue. That these contentions have been found to be untrue does not, however, answer the question of whether Schwartz was making untrue statements with knowledge of their falsity.

22. The Judge recognized that Schwartz at the times of his statements and testimony would have had a strong motive to misrepresent the facts in order to preserve his unblemished record as a station manager. Yet the Judge specifically concluded that Schwartz was attempting to tell the truth as best he could and that he was not deliberately misrepresenting.

23. The Broadcast Bureau argues that Schwartz was consistently lying. The licensee argues that Schwartz's age, his health and personal problems, and the labor negotiations in which he was participating for the first time in 1969 combined to place him under such stress that his conduct was aberrational and not in character. The Judge refused to accept the licensee's argument of aberrant conduct and we agree. The evidence shows that Schwartz censored Sheldon in 1968 and there is no suggestion that the combination of stressful conditions alluded to by the licensee as existing during the 1969 campaign were present in 1968. We do think, however, that although Schwartz was aware of his conduct at the time the incidents happened in the fall of 1969, his subsequent recollection of those events for the first time eight months later could well have been affected by the factors argued by the licensee.

24. The Judge arrived at his conclusion that Schwartz "did not engage in deliberate misrepresentation in his prehearing statements or in prevaricating in giving his testimony" by relying on his observation of the witness's demeanor and on Schwartz's responses indicating he had a poor recollection or no recollection of many events, although he did remember some. With respect to the particulars of sessions with the candidates, which Schwartz did not recall, the Judge relied on the doctor's testimony that Schwartz in the latter part of 1969 was suffering from ailments attributable to anxiety and tension, and that stress affects the ability to concentrate so that events do not register on one's mind.

25. The record discloses other reasons which taken together explain why Schwartz's recollection may have been distorted and why as to some events there should be complete absence of memory. Schwartz was 68 in 1969 when his confrontations with the candidates took place. He had been general manager for 23 years with absolute control of day-to-day operations. He was in a position of absolute power, confirmed by Gillespie's referring Sheldon's complaints back to Schwartz. He believed he could properly review the candidates' scripts and persuade them to delete material. Some of his suggestions related to matters of grammar or expression rather than content. He was trying to improve the candidates' scripts for them while primarily preventing any "objectionable" material from going over the air to the damage of the station's "image." Some suggestions were accepted by the candidates without any or any serious opposition. Schwartz's perception of those occasions might be that he had succeeded in persuading the candidates. He denied having forced the candidates to make changes in their scripts. He acknowledged that on occasion the candidates disagreed with his suggestions, but he testified he was always able to "convince" them to make the suggested changes and they "invariably went along." (Tr. 146). The candidates' testimony reveals that they did in fact always eventually acquiesce in making the changes in their scripts. It is not improbable, given these circumstances, that in fact Schwartz did believe in retrospect that he had not forced the changes on the candidates. In some instances, moreover, there was heated opposition by the candidates. The record strongly suggests that Schwartz, by virtue of his absolute power, was not accustomed to opposition in managing the station. The heated arguments would in

themselves create an additional immediate stress which could account for Schwartz's failure to remember any threats he had made in the course of the arguments.

26. Thus, it is not capricious on this record to believe Schwartz's honesty in stating, upon reconstructing the encounters some eight months later: (1) that he did not recall any deletions or threats and (2) that he had always succeeded in persuading the candidates. Beyond what is on the cold record, however, we have the Judge's specific conclusion that "[t]he overwhelming impression created by Schwartz's testimony is that the misstatements made by him were the product of faulty recollection rather than intentional untruthfulness."

27. The Judge's conclusion that Schwartz was testifying honestly must be given great weight because the Commission has had no opportunity to observe the witness. The Bureau objects to the use of demeanor in this context and argues that it is useful only in resolving conflicts in the testimony. The Judge used demeanor for two purposes: (1) to determine what the facts were, and (2) to determine the honesty of the witness. The Judge determined that Schwartz's testimony was not to be credited as against the specific, detailed, contradictory testimony of other witnesses. We do not think, however, that that conclusion precludes the separate conclusion that Schwartz was trying to testify honestly. As between conflicting testimony. Schwartz's was found to be not true. But on the question of deliberate falsity in his testimony, it is not inconsistent to conclude that Schwartz was not a perjuring witness.

28. We recognize that the crucial point under the misrepresentation issue is whether Schwartz deliberately lied in his prehearing statements to Commission investigators, and not whether his testimony at the hearing was false. Hence, it might be argued that the Judge's observance of Schwartz's demeanor at the hearing is irrelevant to his state of mind at the time he responded to the Commission inquiries. In this case, however, we believe that the Judge's conclusion that Schwartz did not deliberately misrepresent at the hearing also supports a conclusion that Schwartz did not deliberately misrepresent in his affidavits. Schwartz at the hearing essentially repeated the statements which he had made in his previous affidavits; he denied making deletions and threats (as he had done in his first two affidavits) but he also said (as he did in his December 1970 affidavit) that he could have and probably did (even testifying to a deletion he did *not* make). In his December 1970 statement, which was intended to amend his first two statements, Schwartz said he could not deny that he made deletions or made them a condition for use of the station; he emphasized repeatedly that he could not remember doing so; and he said he was relying on the memory of others as to what transpired. We think that Schwartz's testimony and December 1970 affidavit are not essentially inconsistent taken in context. Although the decision is troublesome, we are willing in this close case to rely on the Judge's evaluation of Schwartz's honesty and to conclude that Schwartz's misstatements were the result of a failure of memory. We conclude, therefore, that Western has not been guilty of misrepresentations.

29. Clearly, however, Western has been guilty of numerous violations of both Section 315 and the Commission's Rules. The violations

of Section 315 and the corresponding Commission Rules are grievous. The licensee controls the only radio stations in Stamford and, by censoring the candidates who bought time on the stations, interfered with the free flow of information to the electorate. We would be warranted in revoking the licenses for willful and repeated violations of Section 315, absent any mitigating factors.

30. The final question for consideration thus is whether the grievous violations of Section 315 are mitigated by the overall programming of the licensee. The Judge made findings on the licensee's record for the composite weeks of 1969 and 1970 and also on a comparison of the licensee's 1969 and 1970 composite weeks with the most recent composite week (1968) on file with the Commission of 45 other Class IV radio stations in the New England States and New York State. The Broadcast Bureau does not challenge the findings on programming that appear in paras. 113–149 of the Initial Decision. Approximately 30 percent of total air time in the 1969 composite week and 28 percent in the 1970 composite week was devoted to news. These percentages included approximately 12 percent of total air time each composite week devoted to local news. The licensee ranked first in 1969 and second in 1970 on total time devoted to news, and ranked first in both years in percent of time devoted to news. We think that the use of comparative figures may have some value in deciding the issue, but should not be the conclusive criterion for determining "meritorious" programming. A station could rank first among statistically comparable stations and therefore be above average but still not meet a standard of public service that would enable the licensee to avoid revocation. Here, however, the record shows figures for programming in non-entertainment categories that (except for public service announcements) demonstrate an effort to serve the public.

31. We think that, despite the shortcomings in the licensee's PSA performance, the other significant areas of performance warrant the conclusion that the licensee's programming in the field of public affairs reflects close attention to the goal of a well informed electorate and to the needs and interests of various community organizations. We conclude, therefore, that the overall programming was good enough to tip the scales against revocation and to permit a conclusion that Western is qualified to remain a licensee; however, we also conclude that the misconduct was so serious that we shall impose the maximum permissible fine of $10,000.

32. Our determination on the mitigating effect of the overall programming is made with these caveats: (1) it resolves only this revocation proceeding; (2) it does not establish or forecast the Commission's position with respect to any policy on programming standards that may ultimately result from the Commission's inquiry into the matter of "superior past programming" which might give a renewal applicant a "plus of major significance" in comparison with a competing applicant (Docket No. 19154, 31 FCC 2d 443, released August 20, 1971); and (3) our determination here on the programming issue does not necessarily create for this licensee a preferred position in any comparative proceeding concerning its renewal application. Finally, we note that this proceeding will become part of the licensee's file and this

opinion thus properly may be considered when action is taken on the licensee's renewal application.

33. THEREFORE, IT IS ORDERED, That Western Connecticut Broadcasting Company, licensee of Stations WSTC and WSTC–FM, FORFEIT to the United States the sum of $10,000.00 for violations of the Communications Act of 1934, as amended, and of the Commission's Rules as shown in the above Decision. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Rulings on Broadcast Bureau's Exceptions to Initial Decision

Exception No.	*Ruling*
1	Denied. Although Schwartz could not recall the exact words of the NAB's Catechism, a reasonable inference from the record is that he had interpreted it to mean that candidates could be required to submit scripts in advance, otherwise there would have been no opportunity to persuade them to delete obscene or defamatory material, as the Catechism stated he could do.
2, 6	Denied. Decisionally insignificant.
3, 15	Granted. See para. 13 of this Decision.
4	Denied. The finding in n. 15 that Sheldon did not specifically inform Gillespie that Schwartz was deleting material from Sheldon's scripts accurately reflects the record.
5	Granted. Schwartz's statement that he had confidence in the Republican candidate to conduct a campaign in good taste and in the person who was assisting him in the preparation of his announcements appears in Schwartz's Affidavit dated December 4, 1970, accompanying Western's Petition for Reconsideration, and not, as the Judge found in n. 18, in Schwartz's June 19, 1970 statement.
7	Denied. In para. 48 the Judge found that Gillespie testified that Schwartz informed him of the Fusion Party candidate's addendum the morning after it was broadcast. The Commission considered this finding in its discussion of the alleged misrepresentation. See paras. 19 and 20 of this Decision.
8, 20	Denied. See paras. 19 and 20 of this Decision.
9	Granted in part and denied in part. Granted to the extent that the word "[p]ossibly" in the penultimate sentence in para. 101 is struck, and to the extent the phrase beginning "certainly" in the ultimate sentence does not conform to paras. 17 and 18 of this Decision. Denied in all other respects.
10	Denied. Gillespie testified "to the best of my knowledge" (Tr. 95–96) that the Republican candidate did not appear personally. See also, ruling on Western Broadcasting Company's Exception 21.
11 and 12	Granted to the extent that paras. 8 and 9 of the Conclusions seem to exculpate the licensee because of failure to know the Commission's implementations of Section 315 or to seek counsel with respect to the law. A licensee acting without advice of counsel acts at its peril. See para. 7 of this Decision. *Denied* in all other respects.
13, 18	Denied. See para. 17 of this Decision.
14	Denied. Para. 16 of the Conclusions of the Initial Decision is a reasonable interpretation of the record evidence.

Exception No.	*Ruling*
16	Denied. Para. 18 of the Conclusions of the Initial Decision is a reasonable interpretation of the record evidence.
17	Denied. See para. 16 of this Decision.
19	Denied. The last two sentences of para. 28 of the Conclusions of the Initial Decision are a reasonable interpretation of the record evidence. See also paras. 17 and 18 of this Decision.
21	Granted. See para. 23 of this Decision.
22	Denied. See paras. 24–28 of this Decision.
23	Denied. See para. 14 of this Decision.
24	Granted in part and denied in part. Granted to the extent the Summation is inconsistent with our rulings on the Broadcast Bureau's Exceptions 3, 5, 9, 11, 12, 15, and 21. Denied in all other respects.
25	Granted in part and denied in part. Granted to the extent that any portion of paras. 62 through 67 of the Summation of the Initial Decision are inconsistent with this Decision, Denied in all other respects.
26	Denied. No deliberate misrepresentations were found. See paras. 15–28 of this Decision.
27	Denied in accordance with this Decision.

Rulings on Exceptions of Western Connecticut Broadcasting Company

1	Granted in part and denied in part. Granted to the extent that the stations were reflections of Schwartz. Denied in that Gillespie's reliance on Schwartz, a layman, to know the law cannot absolve Gillespie of responsibility. See also paras. 7, 8 and 17 of this Decision.
2	Granted.
3	Denied. See para. 7 of this Decision and the ruling on Exception 1, *supra*.
4, 6–9, 11–14, and 16	Granted in part and denied in part. Granted to the extent necessary to conform to the conclusions in paras. 21–27 of this Decision. Denied in all other respects.
5	Denied. The Initial Decision correctly reflects the record which shows that Kuczo recalled only one script in which Schwartz made deletions which Kuczo protested.
10, 22–25 and 29	Denied. Decisionally insignificant.
15	Denied. The last sentence of para. 15 of the findings of the Initial Decision correctly reflects the record.
17	Denied. Para. 57 of the findings correctly reflects the record.
18 and 19	Granted. Add to paras. 58 and 60 of the findings that Sheldon in his conversations with Gillespie talked rapidly about a variety of subjects. See para. 18 of this Decision.
20	Granted in part and denied in part. Granted to delete any suggestion in paragraph 65 of the findings that Gillespie was lying when he said in 1970 that he did not remember Sheldon's complaints of 1968. Denied in all other respects. See para. 18 of this Decision.
21	Granted in part and denied in part. Granted to the extent that para. 67 of the findings is corrected to read that Gillespie testified that "to the best of my knowledge" the Republican candidate did not appear in any paid political announcements (Tr. 95–96) and that Schwartz testified that the Republican candidate "might have been" in some announcements, "but I'm not sure". (Tr. 311) Denied in all other respects.
26	Denied. See paras. 17, 19 and 20 of this Decision.
27	Denied. See para. 20 of this Decision.

Exception No.	*Ruling*
28	Denied. Sheldon did not state specifically that Schwartz was compelling deletion of material, but Sheldon's repeated expression of concern about Schwartz's treatment of Sheldon's scripts should have put Gillespie on notice that Schwartz's actions with respect to political candidates required some investigation, and to that extent Gillespie did not heed Sheldon.
30	Denied. Para. 21 of the Conclusions is supported by the evidence.
31	Denied. Para. 16 of the Conclusions is supported by the evidence. See paras. 8 and 17 of this Decision.
32 and 36	Denied. Para. 18 of the Conclusions is supported by the evidence. See paras. 17 and 18 of this Decision.
33	Denied. See para. 9 of this Decision.
34, 35, and 41–43	Granted.
37	Denied. See paras. 8 and 17 of this Decision.
38	Denied. Sheldon did not state specifically that Schwartz was compelling the deletion of material, but Sheldon complained repeatedly about Schwartz's interference with the scripts.
39	Denied. See paras. 19 and 20 of this Decision.
40	Denied. Para. 33 of the Conclusions is supported by the evidence. See also paras. 23–25 of this Decision.
44	Granted in part and denied in part. Granted to the extent that the record reflects that Schwartz's threats were made during heated arguments. Denied in all other respects. See paras. 23 and 17 of this Decision.
45	Granted in part and denied in part. Granted to the extent that para. 57 is inconsistent with paras. 10 and 11 of this Decision. Denied in all other respects.
46	Denied. See paras. 8 and 17 of this Decision.
47	Denied. The licensee is responsible for its general manager's derelictions because it failed to exercise adequate control and supervision consistent with its responsibilities. See paras. 8 and 17 of this Decision.

Dissenting Statement of Commissioner H. Rex Lee, in Which Commissioner Johnson Joins

On October 8, 1970, the Commission released its Order to Show Cause and Notice of Apparent Liability in this proceeding, which directed Western Connecticut Broadcasting Company to show cause why its licenses for Stations WSTC and WSTC–FM, Stamford, Connecticut, should not be revoked. In its Order, the Commission specified issues to determine whether Western had censored political broadcasts in violation of statutory and administrative prohibitions, had failed to afford equal opportunities to all qualified candidates for the same public office, had violated certain record-keeping and logging requirements of the Commission and had misrepresented facts to the Commission concerning its broadcast of political announcements. In a subsequent action, the Review Board enlarged the hearing issues to include a determination of whether Western's programming on WSTC and WSTC–FM had been meritorious, particularly with regard to public service offerings.[1] On June 9, 1971, the Commission denied a

[1] See 26 FCC 2d 1019, released December 30, 1970. In its Order, the Board indicated that evidence of a past broadcast record of meritorious programming "may mitigate adverse findings under the misrepresentation and character issues." However, in a later action involving another proceeding, the Board reversed its earlier position by holding that meritorious programming would not be of decisional significance in the face of willful mis-

petition for reconsideration of the Show Cause Order, filed by Western, in which the licensee contended that an evidentiary hearing was unnecessary, but admitted that its violations of the Communications Act and the Commission's Rules warranted the imposition of a monetary forfeiture.

Hearings in this proceeding were held in 1971, and, on August 4, 1972, the Administrative Law Judge released an Initial Decision in which he concluded that Western had illegally censored political broadcasts, had failed to provide equal opportunities to political candidates and had committed logging and record-keeping violations. In regard to the misrepresentation issue, the Judge found that although Western principals had made statements to the Commission that did not conform with the true facts, the statements did not constitute *deliberate* misrepresentations. He ultimately concluded that although the licensee had been derelict in carrying out its responsibilities, a monetary forfeiture of $10,000 was the appropriate sanction in this case, especially in view of the overall meritorious programming of the stations in the past, the absence of any political motivation for the unlawful censorship and the extensive corrective measures taken by the licensee. The Broadcast Bureau filed exceptions to the Initial Decision, claiming that Western is not qualified to remain a broadcast licensee and that its licenses for WSTC and WSTC–FM should be revoked. The Bureau contends that Western illegally censored paid political announcements broadcast by the Stamford stations, which are the only facilities licensed to the community, and that the seriousness of the Section 315 violations is compounded by the fact that Western's principal owner and general manager engaged in a series of misrepresentations to the Commission relating to the political broadcasts.

The majority admits that it is "seriously troubled with what appear to be gross contradictions between the facts as found by the Judge and the statements made by Schwartz" [2] and with the instance in which the Judge found that Kingsley Gillespie, president, treasurer, director and 51.6% owner of the licensee corporation, had engaged in an "inexcusable exaggeration." However, it appears to agree with the Judge's conclusions that neither Gillespie nor Schwartz *deliberately* misrepresented facts to the Commission and that the licensee's numerous violations of Section 315 of the Act and Commission regulations, which are characterized as "grievous" since they interfered with the free flow of information to the electorate, would justify license revocation in the absence of mitigating factors. According to the majority, the licensee's overall programming performance in the field of public affairs reflects a close attention to the goal of a well-informed electorate and to community needs and interests and such programming is "good enough to tip the scales against revocation and to permit a conclusion that West-

representations to the Commission although it stated that such a programming showing could be used in mitigation of any evidence concerning the bribery of network officials. See *KFPW Broadcasting Co.*, 33 FCC 2d 313 (1972). The Commission thereafter set aside the Board's Order in the *KFPW* case and deleted the meritorious programming issue. The Commission concluded that no useful purpose would be served by adding such an issue since bribery of network officials (or other acts involving moral turpitude relating directly to the operation of a broadcast station) like willful misrepresentations to the Commission reflects so adversely on an applicant's (or licensee's) basic qualifications that there would be no reason to consider the merit of past programming. 40 FCC 2d 126 (1973).

[2] Julian Schwartz served as general manager of the Stamford stations from 1947 until November, 1970. During 1969, Schwartz was also secretary and a director of Western, but he no longer holds those positions.

ern is qualified to remain a licensee." Like the Judge, the majority imposes the maximum permissible forfeiture for the licensee's conduct.

I cannot join in the majority's decision for I believe that the hearing record compiled in this proceeding demonstrates in a very profound way that Western is not qualified to remain a broadcast licensee. The record indicates that, during the 1969 Democratic Party primary and general election campaigns for mayor of Stamford, Schwartz required all candidates, except the Republican Party mayoral candidate, to submit for review advance scripts of their paid political announcements and programs. Moreover, on numerous occasions, Schwartz deleted material from the scripts of the Democratic Party and Fusion Party candidates (Paul Kuczo, Jr. and John Nocerino, respectively) which he deemed objectionable. On the few occasions when the candidates opposed the deletions, Schwartz informed them that the changes would be made or they would not receive airtime on the Stamford stations. The deletions were required by Schwartz to preserve the stations' "image" although most of the material deleted from the scripts consisted of arguments normally made in a political campaign.

Kingsley Gillespie, Western's principal owner and publisher of the *Stamford Advocate* (the city's only daily newspaper), knew that Schwartz required the prior submission of political scripts and apparently approved the practice in spite of a clear Commission prohibition against it. Gillespie's reliance on an erroneous impression of Section 315 requirements derived from a National Association of Broadcasters' publication and on Schwartz's knowledge of those requirements cannot absolve him from full responsibility for the violations. Similarly, Gillespie must be held responsible for Schwartz's willful deletion of material from political scripts. Contrary to the majority's position, I believe that Gillespie knew that Schwartz was engaging in censorship. Even though he testified at the hearing that he had told Schwartz that he (Schwartz) had no power to change political scripts, the record indicates that Gillespie made no inquiries of either Schwartz or Nocerino (the Fusion Party candidate) when he was informed of Nocerino's broadcast complaint of censorship by WSTC during the 1969 mayoral campaign. Moreover, Gillespie had been advised of the stations' censorship practices in 1968 by Ralph Sheldon, a candidate in several primary contests. The only reasonable explanation for Gillespie's failure to act on the political candidates' complaints is that he already knew and approved of Schwartz's censorship practices.

Moreover, the censorship of political broadcasts by Schwartz was not only violative of statutory and administrative prohibitions, but also constituted a violation of the equal opportunities provision of Section 315 since it had the effect of favoring one candidate over the others. In contrast to the majority's view, I believe that the Administrative Law Judge was correct in concluding that the licensee should have foregone its policy of requiring a minimum separation between announcements of opposing candidates because it enabled the Republican Party candidate to schedule his announcements adjacent to the local news, a much more desirable time period for political announcements. It is more than apparent that the separation policy, as applied by WSTC, did not afford reasonably comparable time to the Fusion Party candidate and that, therefore, it violated the equal opportunities

provision of Section 315. It is also interesting to note in this regard that the stations did waive the separation policy on election eve to accommodate all candidates' requests for broadcast time.

The record evidence in this proceeding clearly indicates that the licensee violated Section 315 of the Communications Act and related Commission regulations by censoring political candidates and by failing to provide equal opportunities for all candidates. Schwartz required the prior submission of political broadcast scripts, reviewed the scripts submitted and, in some instances, deleted material under the threat of of depriving a candidate of airtime. The licensee cannot escape culpability for the actions of its general manager (who was also secretary and director of the corporation during 1969), especially since the record shows that Gillespie knew of and approved Schwartz's censorship. Moreover, Schwartz's activities led to a denial of equal opportunities since the censored candidates were effectively deprived of a full opportunity to make their cases before the electorate. In addition, enforcement of the stations' separation policy severely disadvantaged the Fusion Party candidate since the time period offered for political announcements was not reasonably comparable to that previously offered to the Republican Party candidate. While the hearing record may not establish beyond doubt that these violations resulted from a political bias on the part of the licensee and its principals, the facts remain that the activities of Schwartz favored one candidate; that Gillespie's newspaper, the *Stamford Advocate*, endorsed that same candidate; and that WSTC and WSTC–FM endorsed no candidate. In effect, only one mayoral candidate was endorsed by the local media in Stamford, and Schwartz's unlawful activities favored that candidate. In such circumstances, the licensee's Section 315 violations are seriously aggravated whether or not political bias can be ascribed thereto and are sufficient justification for license revocation.

Unlike the majority, I can see no valid reason for considering the merit of Western's past programming when the Section 315 violations reflect so adversely on the licensee's basic qualifications. In my own opinion, no amount of meritorious programming is sufficient to mitigate or offset the serious violations noted above. Moreover, the licensee's showing under the issue added by the Review Board is subject to fatal deficiencies. For example, the licensee relies on comparative figures, which are not necessarily indicative of meritorious programming. The fact that the Stamford stations may have carried more news programs than other comparable stations is insufficient reason to discount the seriousness of the violations. Moreover, as the Administrative Law Judge noted, the stations' record in regard to the carriage of public service announcements was poor in comparison with other stations, and the presentation of PSAs by WSTC and WSTC–FM was rendered ineffectual by their concentration on weekends and early Sunday morning periods. In any event, there seems to be a basic inconsistency in the majority's rationale which condemns the licensee's censorship practices for interfering with the "free flow of information to the electorate," but which credits the licensee's public affairs programming for contributing to the "goal of a well informed electorate." And this inconsistency is heightened by the majority's holding that its determination

under the programming issue does not necessarily create a preferred position for the licensee in any comparative proceeding involving a renewal application. Certainly, if Western's past programming is sufficient basis to avoid license revocation, it should accrue to the licensee's benefit in any future comparative case. The real point of the majority's statement is that the Stamford stations' past programming is not sufficient in any sense, let alone when measured in the context of a revocation proceeding.

My position on the Section 315 violations almost represents an academic exercise, however, when we consider the fact that both Gillespie and Schwartz engaged in a series of misrepresentations to the Commission. Contrary to the majority's conclusion, this is not a close case on the misrepresentation issue. As the Broadcast Bureau points out in its brief in support of exceptions, there are certain inescapable conclusions that are dictated by the evidentiary facts and that are not found in the Initial Decision or in the majority's opinion on appeal. Gillespie is chargeable with misrepresentation on three separate occasions. The first concerns his statement in an affidavit filed in support of Western's reconsideration petition to the effect that he was "shocked and distressed" to learn of Schwartz's censorship practices during the 1969 campaigns. In spite of his statement, the record evidence demonstrates that Gillespie was well aware of Schwartz's activities, including his deletion of material from paid political announcements over the candidates' objections. In his September 25, 1970, written statement to Commission investigators, Gillespie indicated that he knew of Schwartz's review of political scripts and that he expected review of *all* matters broadcast by the stations. Moreover, during the 1969 campaign, Schwartz advised Gillespie that the Fusion Party candidate had objected to script changes made by Schwartz. Also, Sheldon, whose testimony the Judge credited, had complained to Gillespie about Schwartz's censorship practices in 1968. Any speculation to the effect that Gillespie must have forgotten about Sheldon's complaints should be rejected in light of Gillespie's affirmative representation that he was "shocked" to learn of the censorship practices. In any event, evidence of Gillespie's knowledge of such activities is not limited to Sheldon's complaints.

The matter of Sheldon's complaints also involved another misrepresentation by Gillespie, who, in a September 28, 1971, affidavit submitted to the Commission, stated that Sheldon had *never* complained about Schwartz's censorship prior to September 16, 1971. As the Judge found, contrary to Gillespie's statement, Sheldon had complained to him on numerous occasions about censorship practices prior to September 16, 1971. The majority, like the Judge, concludes that "it is not improbable on the evidence that Gillespie was being truthful in denying Sheldon had complained" since he "probably did not remember Sheldon's complaints." The majority speculates that Gillespie had not been inclined to pay serious attention to Sheldon and had, therefore, forgotten about the complaints. On this basis, the majority absolves Gillespie of willful misrepresentation. However, the facts, as found by the Judge and accepted by the majority, show that Sheldon had complained to Gillespie in 1968 about Schwartz's censorship; that Gillespie testified that he was concerned about Schwartz's practice of

reviewing scripts since it carried with it the danger of censorship; and that Gillespie did remember many aspects of Sheldon's conversations when the latter visited the former's office at the *Stamford Advocate*. In short, the record evidence indicates that Gillespie's September 28, 1971, statement was false and that it was conveyed to the Commission with knowledge of its falsity. Any other conclusion requires a total adherence to the propriety of Gillespie's selective recall, which I cannot accept.

The third misrepresentation by Gillespie concerns his assertion in Western's petition for reconsideration (which he supported by an affidavit) that he did not learn of candidates' complaints until "long after the fact." At the hearing, Gillespie was asked when Schwartz told him about Nocerino's broadcast charge of licensee censorship. Gillespie initially agreed with Schwartz's testimony that he had been informed of the broadcast the next day—but when he was asked to explain his statement about "long after the fact," he indicated that he had not been informed of Nocerino's charge until two or three days after the broadcast. Even though the Judge concluded that Schwartz had informed Gillespie of the broadcast on the next day and that Gillespie was guilty of an "inexcusable exaggeration" (which diminished to the level of a "careless exaggeration" later in the Initial Decision), he did not find an *intentional* misrepresentation by Gillespie, and the majority agrees. The majority attempts to downgrade the impact of Gillespie's statement by pointing out that Gillespie did not learn of the charge until *after* the campaign and, therefore, the time differential is not significant. However, it is clear that the statement was not an "exaggeration" in any degree—it was another intentional misrepresentation by Gillespie, which was designed to minimize his responsibility for the stations' censorship violations and to convince the Commission that a hearing was not necessary. In addition, his change in testimony at the hearing represented an obvious attempt to give vitality to his earlier statement in the petition for reconsideraion and, as such, constituted a further attempt to deceive the Commission.

The hearing record also demonstrates that Schwartz engaged in intentional misrepresentations. In his statement to Commission investigators in July, 1970, Schwartz denied that he had censored the Democratic Party or Fusion Party candidates or that he had deleted material from their paid announcements. He stated that he had requested *all* candidates to submit scripts for his review and that he had made "suggestions" for script modifications. On September 25, 1970, he gave a second statement to the investigators in which he continued to deny that he had required changes in the political scripts although he admitted that he had required Kuczo and Nocerino to submit their scripts for review. In a December, 1970, affidavit (attached to Western's petition for reconsideration), Schwartz acknowledged that he could have insisted upon deletions in the scripts of the Fusion Party and Democratic Party candidates as a condition for their use of the stations' facilities and that he might have made the deletions himself—but that he had no independent recollection of these matters. In his hearing testimony, he stated that any deletions made were with the concurrence of the candidates and that if the candidates objected, the objectionable material remained in the scripts. As the majority points out, Schwartz

had required Kuczo and Nocerino (but not Wilensky, the Republican candidate) to submit their announcements for review prior to broadcast; he required alterations in the scripts; and he threatened the loss of airtime if deletions were not made.

Even though the Judge concluded in his Initial Decision that Schwartz's testimony was false in all material respects, he found that Schwartz had not engaged in deliberate misrepresentations. In so finding, the Judge relied on his observation of the witness' demeanor at hearing and on responses which indicated that Schwartz had a poor recollection of many events (and on the possibility that Schwartz had been suffering from emotional stress in 1969). The majority agrees with the Judge's conclusions, but it asserts additional reasons for absolving Schwartz—his age in 1969; his position of control at the stations for a long period; the candidates' acquiescence in script alterations; etc. The majority reasons that "it is not improbable, given these circumstances, that in fact Schwartz did believe in retrospect that he had not forced the changes on the candidates" and that heated opposition by the candidates would "create an additional immediate stress which could account for Schwartz's failure to remember any threats he had made in the course of the arguments."

In my own view, the crucial question here is not whether Schwartz's testimony at the hearing was true or not, but whether he lied in statements to the Commission before the hearing. Therefore, the Judge's observation of Schwartz's demeanor is not relevant in assessing his state of mind at the time he responded to Commission inquiries and supported Western's petition for reconsideration. The fact remains that the Judge repeatedly rejected Schwartz's testimony about his activities in 1969 at the Stamford stations. In such circumstances, demeanor findings are not necessary to arrive at the true facts and are certainly not conclusive with regard to Schwartz's pre-hearing representations as the majority holds. In effect, Schwartz misrepresented material facts in his statements to Commission investigators, in his affidavit and in his testimony in an obvious attempt to absolve himself of serious wrongdoing. Moreover, it is clear that any emotional stress that might have prevented a clear recollection of his role in the 1969 political broadcasts did not hinder his ability to make affirmative representations to the Commission, which were found to be untruthful.

In summary, the record evidence clearly establishes that Western violated the political censorship prohibition and equal opportunities requirement of Section 315 of the Communications Act and related Commission regulations during the 1969 mayoral elections in Stamford; that the licensee's principal owner, who was aware of the unlawful practices at WSTC and WSTC–FM, controls Stamford's only daily newspaper; and that the political censorship engaged in by Schwartz interfered with the free flow of information to the electorate. Contrary to the majority's position, the licensee's past programming, even if found to be meritorious, cannot diminish the impact of the Section 315 violations, which effectively favored the candidate endorsed by the *Stamford Advocate*. Even if the record in this proceeding does not establish that the licensee's censorship was politically motivated, it is clear that the Section 315 violations alone would be sufficient

reason to revoke the Stamford stations' licenses. However, a decision to revoke the licenses need not rest solely on that basis, for the evidence of record also shows that the licensee's principal owner and long-term general manager misrepresented material facts to the Commission during the investigation of the censorship matters and continued through Western's petition for reconsideration and even into the hearing itself. Since past programming, even of a meritorious nature, cannot be used to mitigate the impact of deliberate misrepresentations to the Commission, the only viable sanction available here is revocation of license. I am very concerned about the majority's decision since it appears to permit a major departure from the traditionally strict standards of candor and honesty imposed on Commission licensees. *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183, 27 RR 2d 1043 (1973); *Milton Broadcasting Co.*, 34 FCC 2d 1036, 24 RR 2d 369 (1972), *affirmed*, Case No. 72–1583, D.C. Cir., January 30, 1973; *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813 (1968), *affirmed*, 142 U.S. App. D.C. 70, 439 F. 2d 580, 20 RR 2d 2126 (1971). Therefore, I must dissent.

F.C.C. 72D–50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSES OF WESTERN CONNECTICUT BROADCASTING CO. For Standard Broadcast Station WSTC and FM Broadcast Station WSTC–FM Stamford, Conn.	Docket No. 19043

APPEARANCES

Thomas H. Wall, *B. Dwight Perry*, and *Susanne Meyer*, on behalf of Western Connecticut Broadcasting Company; and *Gerald M. Zuckerman* and *Katherine Savers McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.[1]

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued July 27, 1972; Released August 4, 1972)

PRELIMINARY STATEMENT

1. The Commission, on October 8, 1970, released its Order To Show Cause and Notice of Apparent Liability in this proceeding (FCC 70–1093). In that document Western Connecticut Broadcasting Corporation (Western), was directed to show cause why its licenses for Stations WSTC and WSTC–FM, Stamford, Connecticut, should not be revoked. It was further ordered that, in the event of a determination that the hearing record does not warrant revocation, it shall then be determined whether an Order of Forfeiture in the amount of $10,000 or some lesser amount should be issued.

2. The Commission's document (Para. 2) stated that information has come to its attention, since the last renewal of the licenses for Stations WSTC and WSTC–FM which raises the following questions:

(a) Whether the licensee censored material intended for broadcast over Station WSTC or WSTC–FM by legally qualified candidates for public office in willful or repeated violation of Section 315(a) of the Communications Act of 1934, as amended, and of Sections 73.120(b) or 73.290(b) of the Commission's Rules;

(b) Whether the licensee willfully or repeatedly failed to afford equal opportunities to all legally qualified candidates for the same public office in the use of its broadcasting stations, in violation of Section 315(a) of the Communications Act and Sections 73.120(b) and 73.290(b) of the Commission's Rules;

(c) Whether licensee willfully or repeatedly failed to maintain its station program logs, in accord with Sections 73.112 and 73.282 of the Commission's rules;

(d) Whether licensee willfully or repeatedly failed to maintain for public inspection a list of chief executives, officers or members of the executive committees or boards of directors of various committees that purchased time for

[1] *Melvin M. Dichter* appeared on behalf of Julian Schwartz, a witness in the proceeding.

political programs as required by Sections 73.119(f) and 73.289(f) of the Commission's Rules;

(e) Whether during the Commission's inquiry into this matter the licensee misrepresented facts or was lacking in candor in responding to inquiries of the Commission;

(f) Whether the licensee possesses the requisite qualifications to remain a licensee of the Commission.

3. Western was directed to appear and give evidence in a hearing. The Commission further ordered that the Chief of the Broadcast Bureau serve upon Western a Bill of Particulars regarding the matters referred to in the above-listed issues. The Bill of Particulars was issued October 12, 1970.

4. Upon motion of Western, the Review Board, in a Memorandum Opinion and Order (FCC 70R–455), released December 30, 1970, added the following issue:

To determine whether the programming of Stations WSTC and WSTC–FM have been meritorious, particularly with regard to public service programs.

5. By Memorandum Opinion and Order (FCC 71M–280), released February 22, 1971, the Hearing Examiner denied a Petition to Clarify Issues, filed by Western on February 9, 1971, to permit adduction of evidence under issues (e) and (f), *supra*, relating to Julian Schwartz's general character and reputation for honesty and integrity. However, the Examiner also ruled that denial of the petition would not prevent the introduction of some limited amount of testimony relating to the general reputation of Mr. Schwartz [2] for truth and veracity in Stamford, if as a witness, his testimony were challenged or contradicted. An appeal from the Examiner's ruling on the petition to clarify issues was denied by the Review Board in a Memorandum Opinion and Order (FCC 71R–133) released April 21, 1971.

6. A petition for reconsideration of the Commission's action instituting the revocation hearing, which had been filed by Western on December 7, 1970, was denied by Memorandum Opinion and Order of the Commission (FCC 71–603) released June 15, 1971. During the pendency of the reconsideration petition, commencement of the hearing had been postponed by order of the Examiner (FCC 70M–1696), released December 11, 1970.

7. Prehearing conferences were held December 3, 1970 and July 16, 1971. Hearing sessions were held in Stamford, Connecticut on October 19 through October 22, 1971, and in Washington, D.C. on December 21, 1971,[3] with the record being closed on the last-mentioned date. Proposed findings of fact and conclusions were filed by the parties on April 3, 1972. Neither party filed a reply.

Stamford, Conn.

8. The city of Stamford, a community of 108,798 persons (1970 U.S. Census), is located in southwestern Connecticut on Long Island Sound, about 35 miles from New York City. As there was considerable evidence concerning political broadcasts directed toward Italian voters,

[2] Julian Schwartz was the manager of Stations WSTC and WSTC–FM from 1947 until November, 1970.

[3] By order of the Examiner (FCC 71M–1696), released October 27, 1971, the place of the hearing was transferred to Washington, D.C.

it is pertinent to note that over 30 percent of the population is of Italian stock.

The stations involved

9. WSTC and WSTC–FM are the only stations licensed to Stamford. Western Connecticut Broadcasting Company, which was organized by Kingsley Gillespie in 1945, became the licensee of WSTC, by purchase, in January, 1946 and of WSTC–FM by original application, in 1947. The stations have since received license renewals regularly and they have never been fined. Except for technical matters discovered in routine inspections, they have never before been charged with violation of any Commission rule or statute.

Kingsley Gillespie and ownership of Stamford Media

10. Kingsley Gillespie is President, Treasurer and a Director of the licensee corporation; he has held these positions since 1946. Mr. Gillespie owns 51.6% of the corporation's stock personally. Gillespie Brothers, Inc. owns and publishes the *Stamford Advocate*, the city's only local daily newspaper. Mr. Gillespie, the President, Treasurer and a Director of Gillespie Brothers, Inc., is the publisher of the *Advocate*. This newspaper has been in the Gillespie family since 1867, and it is Stamford's oldest business enterprise.

11. Born in 1895, Kingsley Gillespie was 75 at the time of the 1969 mayoralty campaign and 76 at the time of the hearing. In 1969, Mr. Gillespie had his offices on the second floor of the newspaper offices at 258 Atlantic Street. The WSTC studios were located on an upper floor at 270 Atlantic Street. Mr. Gillespie did not have an office at WSTC's studios primarily because of lack of space there.[4] The two buildings housing the newspaper and the radio stations were about 200 feet apart. Mr. Gillespie did not visit the studios regularly because of his age and the climbing of many stairs required. He did meet practically on a daily basis in his own office with the general manager of the stations, Julian Schwartz, who was somewhat younger. The meetings varied from a few minutes to over half an hour. There were occasions on which Gillespie was too busy to see Schwartz. Schwartz would also telephone Gillespie to discuss matters that came up at the station. Gillespie also telephoned Schwartz, but not concerning happenings of the day on which he called. The purpose of the almost daily meetings between Gillespie and Schwartz was to discuss matters concerning the operation of the station such as programming and personnel. Schwartz would report problems to Gillespie and Gillespie would give Schwartz the benefit of his thinking on policy decisions. Gillespie set policy.

Julian Schwartz

12. At the time of the events which figured in the hearing the general manager of the Stamford stations was Julian Schwartz. He became associated with WSSR (now WSTC) in Stamford as a part-time newsman in 1942, was advanced to full time newsman and then was made the assistant manager. After the station was purchased by Western, Mr. Schwartz became general manager within a year after

[4] In July, 1971, WSTC moved its studios to a new location. Kingsley Gillespie did not have an office at the new studios as of October 19, 1971 because, as he explained, "We're really not settled completely yet."

that. As the general manager it was his duty to carry out the policies as set by Mr. Gillespie and he was in full charge of the stations' operations. There were many day-to-day problems he could and did decide himself. He served as general manager of the Stamford stations from 1947 until November 1970, when he was relieved and subsequently made sales manager, having served for an interval of about 10 days as news editor. During 1969, Mr. Schwartz was also secretary and a director of Western but he no longer holds those positions. He was 68 at the time of the 1969 mayoralty campaign and 70 when the hearing took place. At the time of the hearing Mr. Schwartz had been told that effective December 31, 1971, he must retire.

The censorship issue

A. *In General—*

13. Prior to 1969, Julian Schwartz was reviewing the scripts of of political candidates before broadcast (Tr. 72–73, 74–75; Western Ex. 2, p. 2).[5] According to Mr. Schwartz, the purpose of this review was to make certain that the text could be delivered within the time purchased and to insure that the material was in good taste (Tr. 136).[6] The standard for what constituted good taste was Schwartz's own (Tr. 76). He did not believe that a comment critical of someone was necessarily objectionable. In his view, material was not in good taste and was objectionable if it involved name-calling or a person's reputation, an exaggeration, or seemed otherwise objectionable.

14. Kingsley Gillespie was aware of Schwartz's policy of requiring candidates for political offices to submit their scripts of paid announcements for review by Schwartz before broadcast. Although Gillespie was not happy over the possibility of censorship,[7] he subscribed to the policy because he could think of no better solution to the problem of preserving the image of the station for good taste. He stated before the hearing that he was not aware this policy violated any Commission regulation or any federal statute (Western Ex. 2, p. 3), and he testified that he did not consider reviewing the scripts an act of censorship (Tr. 90). For, as he understood the law, a licensee could look at a candidate's scripts and attempt to persuade him to make changes in material which was not in good taste; however, if the candidate refused to make changes, the licensee had no power to require revisions. Gillespie instructed Schwartz accordingly and he stated that he thought they had an understanding that Schwartz would not exceed the bounds of general persuasion even if material was not in good taste. Gillespie testified that he did not discuss in detail with Schwartz how far he should go in attempting to persuade a candidate to revise material. Nor did he specifically instruct Schwartz as to what

[5] Apparently Schwartz did not consistently require all political candidates to submit scripts. Bruno Giordano, a Democratic candidate for mayor in 1967, testified that there were no set review procedures that year (Tr. 471–72). Paul Kuczo, who was defeated by Giordano in the 1967 Democratic primary, also testified that his scripts were not reviewed during that election (Tr. 317).

[6] Schwartz stated too that his motive was to protect the reputation of the station and to assist the candidates (Western Ex. 1, p. 4). Gillespie testified that one of the purposes of reviewing scripts "was to keep from destroying the image of the station that we had spent so many years building up." (Tr. 75).

[7] Gillespie testified (Tr. 89–90): ". . . I wasn't happy with the threat of censorship when you try to talk a man out of poor taste, but I certainly had the motive of keeping the broadcast in good taste."

constituted good taste, because after 25 years' experience with the man, he thought Schwartz knew what was in good taste and what was not. Gillespie testified that if Schwartz did require deletion of anything from candidates' material, it was done against his directions and without his knowledge (Tr. 72–76, 89).

15. Julian Schwartz testified that he was unaware his policy might have violated Section 315 of the Communications Act. Schwartz said he read a "catechism" issued by the National Association of Broadcasters which supported his belief. A portion of this document, entitled "Political Broadcast Catechism and Fairness Doctrine, 6th Edition" (Tr. 286), was read into the record by Mr. Schwartz:

> A. Question 67 is, "What can a station do if a candidate contemplates a speech including obscene or defamatory passages?" And the answer is, "Licensee should attempt to persuade" and persuade is in italics and, "candidate to delete it. However, if the candidate insists, the licensee under the no censorship provisions of Section 315 must allow the candidate to go on the air with his material uncensored." (Tr. 287).

Schwartz first read this "catechism" sometime in 1968. He testified that he would consider name-calling defamatory (Tr. 287).

16. Schwartz also testified that he read the Commission's document entitled "Use of Broadcast Facilities by Candidates for Public Office", published in May 1966. (Tr. 142–143) Question 7, Section 7 of that document reads as follows:

> Q. May a licensee, as a condition to allowing a candidate the use of its broadcast facilities, require the candidate to submit an advance script of his program?
>
> A. Section 315 expressly provides that licensees "shall have no power of censorship over the material broadcast under the provisions of this section." The licensee may request submission of an advance script, to aid in its presentation of the program (e.g., suggestions as to the amount of time needed to deliver the script). But any requirement of an advance script from a candidate violates Section 315. A licensee could not condition permission to broadcast upon receipt of an advance script, because "the Act bestows upon the candidate the right to choose the format and other similar aspects of the 'material broadcast', with no right of 'censorship in the licensee.'" (31 Fed. Reg. 6671) [Citations omitted]

Schwartz admitted he had read the Question 7 material quoted above prior to the 1969 mayoralty campaign (Tr. 144).

17. During the 1969 election campaign in Stamford neither Kingsley Gillespie nor Julian Schwartz had the advice of either local or Washington communications counsel with respect to matters relating to the Communications Act. Kingsley Gillespie kept himself informed in a general way on the contents of Commission regulations, but he placed complete reliance on Schwartz in this area (Tr. 686–87). Gillespie gave Schwartz only general instructions to comply with Section 315 and to treat all candidates fairly and equally (Tr. 68, 71–72, 139–40, 278–79).

18. The record establishes that during the fall of 1969 Julian Schwartz was under unusual stress. In addition to his habit of working seven days a week (he was usually at the station [8] Saturday morning and Sunday morning), and his reluctance to take a vacation, he par-

[8] The programming of WSTC is duplicated on WSTC–FM during major portions of the day, including those times relevant to the Section 315 inquiry. Therefore, reference to "the station" or "WSTC" is intended to refer to both stations.

ticipated in labor negotiations for the first time[9] (Tr. 99, 280); had to place his mother who had lived with him for 25 years in a rest home (Tr. 590, 598–99); and he experienced generally poor health (Pet., App. B; Tr. 590, 598–599). Dr. Saul Sherman, his personal physician, testified that he was under treatment for hypertension and gout (Tr. 590). During the latter part of 1969 he also suffered from angioneurotic edema and hives, which on one occasion caused him to lose consciousness (Tr. 591). Dr. Sherman attributed these latter maladies to anxiety and tension (Tr. 591, 598–99). Dr. Sherman stated that Schwartz had never before suffered anxieties to such a degree that they caused these physical manifestations (Tr. 594). He also testified that the physical and emotional stresses could have affected Schwartz's judgment and did in fact, cause him to be more irritable and upset (Tr. 592). Judge Maurice J. Buckley, who handled the labor negotiations (Tr. 621), testified that during this period Schwartz seemed high strung and became aggravated easily (Tr. 632). Judge Buckley has known Schwartz since 1924 (Tr. 621), had seen him at least monthly prior to the negotiations, and had always accepted Schwartz as "a cool, calm and collected gentleman" (Tr. 633).

19. Dr. Sherman also testified that these stresses might have caused lapses of memory in Schwartz (Tr. 593). Stress and preoccupation, the doctor said, affect the ability to concentrate so that events simply do not register in one's memory. Memory lapses are more common in people of advanced years, and that could be true of Schwartz. The doctor also said that lapses of this nature would be accentuated by unusual tensions (Tr. 600–602).

20. Stamford, Connecticut elects a mayor every odd numbered year. In 1969 the general election was preceded by a primary between two candidates seeking the Democratic party nomination. In the primary, which was held on September 25, the incumbent Democratic mayor, Bruno Giordano, was narrowly defeated by his challenger, Paul Kuczo. The Republicans did not have a primary contest but did nominate their own candidate, Julius Wilensky. There was also an Independent candidate, John Nocerino, on the election ballot on the Fusion Party ticket. Paid political announcements on behalf of all the candidates in the primary and general elections were broadcast by WSTC, the only broadcast facility (AM and FM) in Stamford.

Paul Kuczo, Jr.

21. Paul J. Kuczo, Jr., is a school teacher and has lived in Stamford for all of his 41 years. Mr. Kuczo entered and won the primary contest for the Democratic mayoralty nomination in Stamford in 1969. He defeated the incumbent, Bruno Giordano by six votes. Mr. Kuczo had first run for local office in 1958 and had sat on the Board of Representatives until 1967. He had entered the mayoral primary in 1967 and lost to Giordano. His 1969 bid to be mayor fell short when he lost the general election to the Republican candidate, Julius Wilensky.

22. Kuczo had purchased time on WSTC when he ran in the 1967 primary. During that campaign he dealt with Julian Schwartz, who

[9] The union was certified as the bargaining agent in August of 1969. Negotiations on the contract began in October, 1969 and ran through the spring of 1970 (Tr. 622).

was then general manager of WSTC. The time Kuczo purchased in 1967 was used to broadcast paid political announcements that were made by the candidate. Kuczo would tape his spots at the station. His scripts were not reviewed by anyone at WSTC (Tr. 126–27, 315–18).

23. In his 1969 campaign Kuczo became a petition candidate in the Democratic primary election during the first week of September. Soon thereafter he purchased time on WSTC for the broadcast of paid political announcements. This time Schwartz instructed Kuczo that he would have to review all of the scripts before the tapes were made. Kuczo was informed, however, that in the event Schwartz was not at the studio to review the script, the tape could be made and Kuczo would be called on the telephone if any changes in the tape had to be made (Tr. 314–15, 317–18, 320–21).

24. Schwartz did not tell Kuczo why his scripts had to be reviewed and Kuczo did not protest when told of the requirement (Tr. 321–22). During the primary campaign Schwartz did not raise any problems with Kuczo's scripts (Tr. 319–20). After Kuczo's victory in the primary, he again arranged with Schwartz to purchase time on WSTC for the general election campaign. Schwartz repeated his requirement that scripts of paid political announcements were to be reviewed. Schwartz indicated that material which was not in good taste could not be taped. This time Kuczo objected to be required to bring his script to Schwartz every time and told Schwartz that he "did not like to be scrutinized" (Tr. 323, 326, 348).

25. Kuczo personally made approximately six tapes of paid political announcements during the general election campaign. On each occasion Schwartz told Kuczo when to appear at the WSTC studio with his script—and on each occasion Schwartz reviewed Kuczo's script (Tr. 327–28). As far as Kuczo was concerned, the review by Schwartz of his scripts was not of major concern until the last week of the campaign. Until then, Schwartz would point out those portions of the scripts which he considered to be in "bad taste." Kuczo did not protest deletion of the material because he did not consider the material in question to be important (Tr. 348). He did, however, tell Schwartz that as far as he was concerned there was nothing wrong with the material (Tr. 329–30).

26. Mr. Kuczo particularly recalled one occasion when the deletion by Schwartz of material from a script lead to emphatic disagreement on the part of Kuczo. He had prepared the text of what was to be his final appearance on WSTC, the night before election day. As usual, the script was reviewed by Schwartz. The script was seven typewritten pages long. Schwartz began by reading through the script. When he reached page 6 he crossed out the following paragraph:

> One issue that the Republican candidate found most embarrasing (sic) was his record with his own company—his present employer—since the company had closed down and left Stamford after labor troubles—the Republican candidate was a member of management at the time and had compiled a poor record of popularity with the labor representatives. When a former shop steward brought out some of his activities, a considerable segment of the electorate was put beyond his reach. He knew this and avoided mentioning labor like the plague.

Schwartz deleted the paragraph by placing "X" marks through the text. He told Kuczo that the speech was not be be broadcast with that material in it (Bureau Ex. 1, p. 6; Tr. 329–31, 334–35).

27. There was no discussion between Schwartz and Kuczo before the paragraph was deleted. After Schwartz crossed out the material, however, Kuczo told him that he had a "hell of a nerve" because there was nothing wrong with the material. Schwartz was adamant—he told Kuczo that the paragraph was a "personal attack" and that the speech would not be broadcast unless the paragraph was deleted. Kuczo had wanted to show that his opponent had compiled a poor labor record—the paragraph in question was the only portion of the script which made reference to that aspect of the campaign (Tr. 336–37).

28. When Schwartz reached page seven of the script he crossed out four names. Kuczo had used the names in referring to a "clique" which he claimed controlled the community. Kuczo again argued with Schwartz and again was told that he either accede to Schwartz's directions or the script would not get on the air (Bureau Ex. 1, p. 7; Tr. 346–48).

29. After having read the entire script through once, Schwartz went over it again with Kuczo. Schwartz objected to additional sections and they were deleted by Kuczo. Kuczo had just had a major disagreement with Schwartz during which he had been threatened with not being able to broadcast his script. By this point when Schwartz made "suggestions" Kuczo did not know whether he would be able to broadcast if he did not follow the suggestions made by Schwartz. Kuczo was anxious to make his tape—he did not want to argue further with Schwartz (Tr. 343–44, 338). Schwartz objected to three lines on the third page of the script and Kuczo deleted them (Tr. 333–34, 338). Schwartz objected to Kuczo's inclusion, on page 5 of the script, of the same names he had already deleted from the seventh page. Kuczo explained to Schwartz that the people mentioned were known to the voters and were supporting his opponent. Schwartz replied that he did not want Kuczo to mention people who were not in the election. Kuczo, not wanting an argument, crossed out the names (Tr. 342–44). Finally, Kuczo's script contained a statement that Wilensky had done something that made it seem that he, Wilensky, was "opposed to the fundamental virtues of our Republic." Schwartz objected and Kuczo crossed out the passage (Bureau Ex. 1, p. 6; Tr. 345–46).

30. Julian Schwartz was handed a copy of Kuczo's script (Bureau Ex. 1) at the hearing. He was specifically referred to the crossed out material on the sixth page. Schwartz could not recall having seen the script previously, although he stated he must have seen it (Tr. 147–48). Nor did he remember crossing off the paragraph on page 6 of Kuczo's script (Tr. 147). He admitted that he had reviewed the Kuczo scripts to make certain they were in good taste and without name-calling. At times, he said, Kuczo tended toward name-calling. Schwartz testified that in all cases Kuczo accepted his suggestions (Tr. 255–256). He denied ever threatening Kuczo or any other candidate use of facilities if there was a refusal to accept his suggestions (Tr. 145–46). Schwartz stated that he "may have insisted" upon deletions but he had not "necessarily enforced the insistence" (Tr. 145). However, Mr. Kuczo's

much more positive recollection of the details of the incident and Schwartz's concession that he may have insisted upon the deletions leaves no room for doubt that Kuczo's testimony is entirely credible and that Schwartz's denial of the threat made to Kuczo cannot be believed. Reliance upon Kuczo's credibility has led to the findings based on his testimony reached above.

Bruno Giordano

31. Bruno Giordano was mayor of Stamford from December, 1967 to November, 1969. He now publishes a weekly newspaper in Stamford. In 1969, Giordano, as the incumbent mayor was opposed by Paul Kuczo in the Democratic primary. During the primary campaign Giordano purchased time on WSTC from Mr. Schwartz for political announcements. Most of Giordano's appearances were by tapes which he recorded at home. These tapes were not reviewed by Schwartz prior to broadcast. On those occasions when Giordano went to the studio with his script, Schwartz reviewed the material and suggested changes. Schwartz did not instruct Giordano that his scripts were to be reviewed. Giordano regarded the review as standard procedure. Giordano discussed the suggestions with Schwartz and at times disagreed with him—Schwartz found portions of the scripts to be too strong. Although there were disagreements, Giordano always gave in and accepted the suggestions. Giordano felt that if he did not agree with Schwartz there would be repercussions if Giordano failed to go along with his suggestions (Tr. 470–78, 480–83). There is no evidence that Giordano complained about the review of his scripts by Schwartz to Kingsley Gillespie.

John Nocerino

32. John Nocerino has an insurance agency, is a real estate developer and a Methodist lay preacher. In 1969 he formed the Fusion party and ran for mayor of Stamford as an Independent. He had never previously run for office. Nocerino became a candidate in late August. Shortly thereafter, he began broadcasting five-minute paid political announcements on WSTC on Monday evenings. Nocerino's dealings at WSTC were with Julian Schwartz. At the very beginning, Nocerino told Schwartz that he would be using his five-minute spots and appearing personally to air his broadcasts. Schwartz indicated that he would have to approve all of Nocerino's scripts prior to broadcast to make sure that they did not contain any libelous material, racial slur or things of that nature. In order to provide sufficient time to review the scripts, Nocerino was told to arrive at WSTC's studios between 3:00 and 4:00 in the afternoon, although his spot was scheduled for 6:25 in the evening (Tr. 385, 394–98).

33. Although Nocerino did not run in a primary election, he was broadcasting paid political announcements during September when Kuczo and Giordano were campaigning for the Democratic nomination. Nocerino made three or four Monday evening broadcasts prior to the Democratic primary. In each instance, Schwartz reviewed his script prior to broadcast. During his review of those first few scripts, Schwartz merely corrected Nocerino's grammar and deleted some

words he regarded as being in bad taste; the candidate accepted the corrections without objection (Tr. 394, 399, 452).

34. After the primary, Nocerino's five-minute Monday evening broadcast was moved from just prior to the 6:30 P.M. local news program to just prior to the 7:00 P.M. network news. He continued the practice of arriving at the WSTC studio early so that Schwartz could review the script for that evening. After the primary, however, Schwartz's reviews took on a different character (Tr. 399, 400–03, 414–15). In Nocerino's words, "now the changes became a little stronger than they were before" (Tr. 403).

35. The following incident illustrates the more stringent approach taken by Schwartz in reviewing Nocerino's scripts. In the script which Nocerino had prepared to be broadcast on October 13, 1969, the following paragraph appeared: (Bureau Ex. 2, p. 2)

> **If Mr. Wilensky is the big business executive he claims to be why did he not, as a member of the Board of Finance, head off the bond issue fiasco which lost us over $600,000 of need (sic) money. The first issue was sold without informing the bond buyers that a law suit was pending against part of the money. An illegal act! Why did Mr. Wilensky keep silent while the bonding was in process and again when Mr. Brant soft peddled the tax payers loss. Both Mr. Wilensky and Mr. Brant were warned at a meeting of the Board of Finance by Mr. Warren Knapp and Mr. Edward Scofield that the issuing of the bonds with a law suit pending was illegal. Neither Mr. Knapp or Mr. Scofield are the big executives that Mr. Wilensky claims to be.**

Schwartz placed an "X" through the entire paragraph. Nocerino asked him why he was deleting the section. Schwartz replied that the contents of the paragraph were untrue. Nocerino argued that he had gotten the facts from the *Stamford Advocate* and that it was his speech and not Schwartz's—that he had a right to bring out the facts. Schwartz insisted that the paragraph was not true. Either the paragraph was to be deleted or you don't go on, he told Nocerino (Tr. 405–07). Because Schwartz had reduced the length of the script, Nocerino rewrote his speech. The replacement script was reviewed by Schwartz who crossed out the words "no wonder" as being in bad taste (Bureau Ex. 2(a), p. 3; Tr. 415–16). Nocerino did not voice an objection when Schwartz deleted the words from the rewritten script. It was getting close to broadcast time and he was apprehensive because Schwartz's attitude had changed (Tr. 417). Nocerino testified: "I felt that if I was going to get on the air at all, I better not say another word." (Ibid)

36. Schwartz recalled that an FCC investigator showed him the original October 13 script (Bureau Ex. 2), which Nocerino subsequently rewrote. He did not remember seeing it during the campaign but agreed that he probably reviewed it with Nocerino since he had reviewed all the scripts. Schwartz indicated that he might have crossed out the paragraph quoted above, or Nocerino might have done it at his suggestion (Tr. 150–54).

37. In the script he prepared for broadcast on October 20, 1969, Nocerino referred to someone as a "rather unimpressive" Kuczo captain. Schwartz deleted the quoted words, telling Nocerino that they were not necessary. Further along, Nocerino had referred to something this individual had done "in his obvious ignorance." This too was deleted by Schwartz as being in bad taste. He ignored Nocerino's

questioning this deletion. Nocerino's script referred to the "level of their mentality" (of Kuczo supporters). The phrase was deleted by Schwartz. In the same script, Nocerino had written that a Kuczo supporter had been required to read a speech that "reeked of gutter-type politics." "Just how desperate is Mr. Kuczo?", Nocerino asked. Schwartz deleted the entire reference as being unnecessary (Bureau Ex. 3, pp. 1–2; Tr. 418–23).

38. Schwartz recognized the October 20, 1969 script as being Nocerino's but had no specific recollection of its contents. He agreed that some of the cross-outs on the script looked like his handiwork. Schwartz did not specifically recall crossing out or objecting to the "reeked of gutter-type politics" section but indicated that his reading of the section on the witness stand lead him to the conclusion then that the section was in poor taste (Tr. 155–59).

39. Nocerino's last appearance on WSTC during the 1969 campaign was on November 3. Once again, Schwartz reviewed his script. Nocerino had wanted to state that Kuczo had "spent an estimated $70,000 to try and change his image." Schwartz crossed out that statement, saying that it was not true. Nocerino told Schwartz the information was received from a reliable source and he felt it was true. Schwartz replied that the statement had to come out. A few sentences later, Nocerino wrote (referring to Kuczo) "How can anyone be in public life so long and accomplish so little." Schwartz crossed it out.[10] Nocerino did not feel arguing was of any use (Bureau Ex. 4, p. 2; Tr. 424–25).

40. In his November 3 broadcast, Nocerino wanted to state that Kuczo had been rejected by the local labor council because of his affiliation with a named Senator whom, according to Nocerino, the union presidents attending a Stamford labor council meeting considered to be anti-labor. Schwartz crossed out the reference to the affiliation with this Senator, saying that it was poor taste to refer to the Senator since he was not involved in the campaign. Nocerino objected. Schwartz told him the reference was out or else Nocerino would not be going on the air (Bur. Ex. 4, p. 2; Tr. 426).

41. Later in the script Nocerino wrote that Wilensky "no doubt will support big business." Schwartz crossed out the statement, saying it was not necessary. Nocerino's script originally stated that he could not accept anything that Wilensky said without a grain of salt, and that the public had seen Wilensky lose his cool more than once at public forums. Both those sentences were deleted by Schwartz because, in his opinion, they were not important (Bur. Ex. 4, p. 3, Tr. 428).

42. Schwartz testified in greater detail about the November 3 script than any of the others. He found that Nocerino's reference to Kuczo spending $70,000 was in poor taste because it was an exaggeration—Schwartz knew that Kuczo did not have $70,000. If Nocerino had written that Kuczo spent $30,000, the section might not have been deleted. Schwartz agreed that he might have personally crossed out the $70,000 section. He did not remember if Nocerino argued against deletion of the material (Tr. 160–63). Schwartz acknowledged that there were other portions of the script which he could have crossed out and "probably did." The language concerning Nocerino's not accepting Wilen-

[10] According to Nocerino, the comment made by Schwartz was that this statement "was improper or irrelevant" or something like that.

sky's statements without a grain of salt and the statement that Wilensky lost his cool at public forums were objectionable because they were "personal attacks" on Wilensky and, therefore, not in good taste [11] (Tr. 165, 167–68).

43. Schwartz recalled objecting to Nocerino's statement "How can anyone be in public life so long and accomplish so little." He objected to the sentence (and either crossed it out or had Nocerino cross it out) because he "thought it was a slap at Mr. Kuczo." Not all "slaps" are objectionable. It depends on what the "slap" is about. Schwartz did not think that this "slap" intimating that Mr. Kuczo had done nothing or very little in public life was in good taste (Tr. 162–63). Nocerino's mention of the Senator was also regarded by Schwartz as being in "poor taste". Schwartz agreed that he probably crossed out that section but he did not remember any particular argument with Nocerino about it (Tr. 164–65).

44. On November 3, when Nocerino broadcast his last paid political announcement of the campaign he brought with him an addendum to the script. He did not show Schwartz the addendum. When he came to the end of his script he read the addendum which was a short statement indicating, among other things, that the Fusion party intended to file a complaint against WSTC with the FCC for illegally censoring its candidate and for discriminating against citizens of foreign language minorities (Bur. Ex. 5, p. 2; Tr. 443). Schwartz did not learn of Nocerino's surreptitious finale until the next morning when he saw a copy of the addendum (Tr. 184–85). He obtained this copy from the news room of the station where Nocerino had left it on a desk after his broadcast of the previous evening (Tr. 185). On November 4, 1969, after seeing the addendum Schwartz dictated a memorandum stating that the additional material "was announced after Mr. Nocerino had completed reading a five minute script which had been approved by the Station Manager. No authorization was asked for this announcement." (Bur. Ex. 5, p. 1; Tr. 185). Schwartz informed Gillespie about the addendum the morning he found out about it (Tr. 185).

45. On a number of occasions Nocerino arrived at the station late when Schwartz was not there. At such times Nocerino was required to read his scripts over the telephone to Schwartz. It was the general practice for Schwartz however to read the scripts of the candidates in the 1969 mayoral election in their presence at the station (Tr. 136).

46. Schwartz testified that he reviewed Kuczo's and Nocerino's scripts to make certain that they were in "good taste". A script was in good taste if there was "no name calling" and "no one's reputation was involved." Schwartz had some difficulty explaining in detail what he meant by his reference to "reputation" but gave "calling them names or referring to them as so-and-so's or liars" as examples (Tr. 137–38, 255–56).

47. In testifying, Schwartz could not remember any instances of either Nocerino or Kuczo insisting that material remain in a script over his objection. According to Schwartz, any material which was deleted from Nocerino's or Kuczo's scripts, was with the concurrence of

[11] Schwartz acknowledged that certain "personal attacks" could be in good taste but was unable to say what distinguishes one that is in good taste and one that is in bad taste without having a specific example before him (Tr. 168).

the candidates (Tr. 139). Schwartz acknowledged that there were times when Nocerino became angry because of his objections but that in almost all instances he was able to convince the candidate that the objectionable material should be deleted. Although he could not remember them, Schwartz conceded there may well could have been instances when he was not able to convince Nocerino and the candidate was permitted to broadcast the material (Tr. 165–67). According to Schwartz, he was more persuasive with Kuczo. He would point out the objectionable material and tell Kuczo that he would prefer that the material not be used. Kuczo always agreed (Tr. 255–56). According to Schwartz, if a candidate insisted that objectionable material was not to be deleted, he was permitted to leave the material in the script. (Tr. 138). Mr. Nocerino's forthright manner of testifying and his ability to readily recall the details of the review of scripts by Schwartz made him a more credible witness and his insistence that he deleted material under open threat by Schwartz had a ring of truth to it which was not matched by Schwartz's denial on the stand.

GILLESPIE'S KNOWLEDGE RE 1969 CENSORSHIP

48. Mr. Gillespie has maintained that if Schwartz deleted anything from paid political announcements of candidates over their objections it was done contrary to his directions and he knew nothing about it (Tr. 73). He testified that he first became aware that there had been a confrontation between Schwartz and a candidate when he learned of Nocerino's addendum the day after it was broadcast (Tr. 74). Gillespie further testified that prior to this incident, no candidate had ever complained his political announcements were being censored, so far as Gillespie knew (Tr. 74). Gillespie stated too that before 1969, to the best of his knowledge, Schwartz had always been successful in persuading the candidates, in cases where it was necessary, to keep the text of their scripts in good taste (Tr. 75).

49. Gillespie was aware before 1969 that Schwartz was reviewing the scripts of political candidates (Tr. 75).[11a] He had instructed Schwartz if the latter was unsuccessful in dissuading a candidate from broadcasting something Schwartz believed to be in bad taste, he had to back away and let the candidate do it (Tr. 76). Gillespie testified that when he learned Schwartz had required deletions from candidates' scripts in the 1969 election campaign he (Gillespie) "was more than surprised". He "was shocked". Gillespie stated that the question had never come up in the mayoralty election campaigns of 1967 or 1965 or 1963 (Tr. 74).

50. Schwartz testified that during the 1969 campaign he mentioned to Gillespie that he was having "difficulties" with Nocerino's paid political announcements but that he did not go into any great detail (Tr. 169). But then Schwartz explained in the following colloquy (Tr. 169–70):

Q. What difficulties did you describe to Mr. Gillespie, if any?
A. Only in connection with the political broadcast and that Mr. Nocerino objected to some of the changes that I made and that was it.

[11a] Gillespie had told Schwartz in the late 40's, and they had an understanding, that Schwartz "has a right to look at the scripts and suggest to the candidate what was not in good taste, but he had no power to force [the candidate] to change it" (Tr. 73).

51. In Schwartz's testimony the next day touching on his almost daily meetings with Gillespie, he described the discussions he had with Gillespie during the 1969 political campaign (Tr. 249–253). Schwartz gave Gillespie the names of those who had purchased time for political announcements. He also told Gillespie there were some problems with some of these candidates and he was taking care of it. Schwartz did not go into the details of the problems or of how he was dealing with them. Schwartz further informed Gillespie that Kuczo and Nocerino had complained about WSTC's news coverage. Gillespie was informed that Nocerino had purchased five minutes on Monday evenings for paid political announcements. He asked Schwartz how things were going along with Mr. Nocerino. Thereupon Schwartz replied as indicated in this following testimony:

> I told him I had made some changes in Mr. Nocerino's political broadcasts, that I didn't think they were in good taste and that was it.

In response to the question whether Gillespie had asked how Nocerino reacted to these changes, Schwartz stated: "He probably did, but I don't remember specifically."

52. Earlier, Gillespie had testified that during the mayoral campaign Schwartz complained that he was having problems with Nocerino, among them that Nocerino had been asked to be at the studio at 4:00 so that his script could be reviewed for his 6:25 broadcast for length and good taste, but was showing up shortly before air time (Tr. 86–87). Schwartz had a second complaint about Nocerino. When Nocerino was late, and arrived at the studio after regular business hours, the news staff had been instructed to call Schwartz at home and have Nocerino read the script to him over the telephone. Schwartz complained to Gillespie that he coud not delete any parts of the script over the telephone (Gillespie's own words) (Tr. 86–87, 400). In this connection, Gillespie testified he was told by Schwartz that his deletions or his changes were always persuasive and were directed toward the final result being in good taste (Tr. 87). Gillespie was not happy with the procedure of having the scripts read over the telephone but could not think of a better solution to the problem occasioned by Nocerino's tardiness (Tr. 88).[12]

53. Gillespie testified that Schwartz had reported to him about the broadcast of Nocerino's addendum. According to Gillespie, Schwartz told him in general terms that Nocerino had declared he was going to complain to the FCC "about his scripts being either edited or changed." (Tr. 79). At this point Gillespie could not say whether he asked Schwartz for any explanation:

> Q. Did you ask Mr. Schwartz whether Mr. Nocerino's speeches had been edited and changed?
> A. I can't remember whether I asked him or not (Tr. 79).

Several transcript pages later, Gillespie mustered a "vague recollection" of asking Schwartz what the facts were regarding Nocerino's complaint but, he added, both he and Schwartz were unable to deter-

[12] In light of Gillespie's definite recollection of Schwartz's complaint to him about Nocerino's tardiness in arriving at the studio, Schwartz's testimony (Tr. 300) that he did not report to Gillespie that Nocerino was sometimes late must be attributed to faulty recollection.

mine whether the accusation was true because Nocerino's scripts were not available.[13] Gillespie did not contact Nocerino directly (Tr. 84).

54. The day after his October 13 broadcast, Nocerino telephoned Gillespie at the Stamford *Advocate*. He was disturbed about Schwartz having deleted material from his script and believed he was being treated unfairly. He wanted to complain to Gillespie. He telephoned Gillespie a second time before going on the air after he had been told by Schwartz that certain material was either coming out of his script or he would not be permitted to broadcast. Both attempts to speak to Gillespie were unsuccessful. Nocerino was told that Gillespie was not in. On both occasions he left his name and telephone number and asked that Gillespie return the call. Nocerino's calls were not returned (Tr. 445–50). Gillespie testified that he never received a message to call Nocerino. Further, he stated that his secretary could not recollect receiving any phone calls from Nocerino (Tr. 690–91). When he is away from the office, a memorandum of each phone call made to him is prepared by his secretary. Gillespie did not remember having seen a memorandum indicating a call from Nocerino (Tr. 691–92).

55. As early as 1968 a candidate for public office in Stamford voiced objections more than once to Mr. Gillespie personally over Schwartz's treatment of his scripts prepared for paid political announcements (Tr. 507, 510, 519, 538, 540). The complaining individual was Mr. Ralph Sheldon who has run in primary elections in Stamford on several occasions (Tr. 491, 520–21).[14]

56. During the campaign, Sheldon purchased more than $500 worth of time on WSTC, including ten 5-minute spots (Tr. 500). Schwartz reviewed Sheldon's scripts and required him to make changes. Schwartz made notations on Sheldon's scripts and told the candidate what he could and could not say. Schwartz also took scripts from Sheldon and returned them the next day with changes (Tr. 495–98, 508–09). He explained to Sheldon that the material in the scripts had to be shown to Gillespie and the station's attorneys for approval (Tr. 508).

57. Sheldon objected to Schwartz's practice of requiring changes in his scripts. He told Schwartz that he was purchasing the time and did not want Schwartz to interfere with his "ideology". Sheldon argued with Schwartz but would usually comply with Schwartz's demands "under protest". He told Schwartz that he disagreed with the changes made in the scripts but went along with them because he wanted to get whatever he could on the air (Tr. 497–99, 504–05). Schwartz had instructed Sheldon that he could not broadcast material that was in bad taste. However, when Schwartz reviewed the scripts he did not object on that basis, but instead eliminated material he claimed would subject the station to law suits (Tr. 498–99).

58. During his campaign for the Democratic nomination for Judge of Probate, Sheldon made an appointment to see Kingsley Gillespie

[13] Gillespie asked Schwartz to try to get the Nocerino scripts and recalls Schwartz reported that his attempt was unsuccessful because he was denied them (Tr. 85).

[14] Testimony by Sheldon was not received as evidence of Section 315 violations but for consideration with regard to the misrepresentation issue and Gillespie's knowledge as to previous instances of censorship by Schwartz before 1969 (Tr. 116–17).

whom he knew to be the owner of WSTC. Schwartz was also at the meeting which lasted 5 or 6 minutes. Sheldon complained that Schwartz was interfering with the expression of his ideology and that he wanted more freedom of speech.[15] Gillespie informed Sheldon that his complaints had to be handled by Schwartz because the radio station was a completely separate organization from the newspaper. During the meeting, at which Schwartz mentioned that broadcasts had to be in good taste with no name calling, Sheldon argued that a radio station could not be sued for something he might say as a candidate (Tr. 510–11, 534–40).

59. Later in 1968, Sheldon again was a candidate in a primary election. This time he was seeking the nomination for State Senate. Once again he bought time on WSTC in order to personally deliver political announcements. His appearances were fewer, however, having purchased approximately $80 worth of time. Sheldon's scripts were again reviewed by Schwartz. Sheldon wanted to refer to organized crime and the Mafia. Schwartz did not allow him to do so and crossed out the material. Sheldon argued that the material was not objectionable. Schwartz told him that the FCC Rules prohibited the broadcast of that type of material and that if it were broadcast the station could be sued and lose its license (Tr. 515–18).

60. Sheldon made several visits to Gillespie's office during the State Senate primary campaign. He was usually informed that he could not see Gillespie. Once or twice, however, he stuck his head in the door and complained that Schwartz was censoring his paid political announcements and news releases. Gillespie referred Sheldon to Schwartz (Tr. 518–19, 541).[16]

61. Schwartz recalled that Sheldon ran in the primary for the Judge of Probate in February 1968 and that he purchased time on WSTC for personal appearances. Schwartz indicated that he reviewed Sheldon's scripts to insure that they were in good taste, contained no name-calling and were within the time limits of the spot purchased (Tr. 265–66). When Schwartz found objectionable material in Sheldon's scripts he would "suggest" to Sheldon that it be deleted. Schwartz testified as to Sheldon's reactions:

> Q. He followed your suggestions?
> A. He usually did.
> Q. Sometimes he didn't?
> A. He didn't like it, but he took it out (Tr. 268).
>
> * * * * * * *
>
> Q. Did he complain to you about having to delete material from his scripts?
> A. Yes, he complained at first, but then after I talked to him he went along (Tr. 269).

[15] No documentary evidence was introduced to show the changes which Schwartz made or required to be made in Sheldon's scripts. The record does not reflect that Gillespie saw any of the Sheldon scripts either before or after the changes made in them. While Sheldon answered "Yes" when asked if he specifically told Gillespie that Schwartz was requiring him to "delete" material, the Examiner is unable to find from a careful review of Sheldon's testimony (Tr. 525–540), that he either specifically or in substance informed Gillespie there were deletions. The absence of Sheldon's scripts or testimony of specific examples cited in the meeting with Gillespie compounds the difficulty in this respect. Although Sheldon testified "in essence" or "in substance" Schwartz was requiring deletions (Tr. 538), when pressed for specifics (Tr. 538–39), the witness did not substantiate these characterizations.

[16] Sheldon ran for office again in 1971. This time his scripts were not reviewed by WSTC personnel (Tr. 521).

62. Schwartz testified that he had persuaded Sheldon to remove material from his scripts and had told Sheldon the offensive material was in poor taste and not in his own interest. Schwartz also told Sheldon all he was trying to do was to improve what Sheldon was going to say (Tr. 269). Schwartz further testified that although he reported to Gillespie that Sheldon had purchased time on WSTC, he did not discuss the candidate's scripts (Tr. 271–72). Instead Schwartz described to Gillespie Sheldon's antics when he came to the studio to buy time.[17] Schwartz stated that he had never seen Sheldon in Gillespie's office (Tr. 272).

63. Gillespie denied that Sheldon ever complained to him about Schwartz censoring his announcements delivered over the station in his own voice (Tr. 114, 188, 693). Nor, so Gillespie testified, did Schwartz report to him in 1968 that Sheldon had complained he was not being permitted to say what he wished to say in paid political announcements (Tr. 118). According to Gillespie, he (Sheldon) would simply drop in unannounced. On one occasion he wanted to read his latest poem. On another Sheldon read something written by him attacking all the lawyers in Stamford. On still another he complained of how his grandfather's estate was inordinately reduced by a local law firm. He would sometimes do push-ups (Tr. 692–93). Sheldon would normally stay two or three minutes, Gillespie said, although it might have seemed longer (Tr. 693–94).[17A]

64. Mr. Sheldon testified at a rapid rate. He admitted that he had done "flying pushups" at Station WSTC and, in his words, "We had a lot of fun." Notwithstanding these circumstances, on the witness stand, Sheldon impressed the Hearing Examiner as being most serious in delivering his testimony and as being a credible witness. Thus the Examiner finds no reason to take Sheldon's testimony lightly or to question his credibility. He evinced a ready recollection of events about which he testified and in any instance where he differed with Mr. Schwartz, whose recollection in general was not as certain, the Examiner prefers to accept Mr. Sheldon's testimony as more reliable.

65. Again, Sheldon's unhesitating recollection of pertinent incidents makes his testimony preferable to that of the less convincing Mr. Gillespie in resolving the conflict between them. Hence, despite denials by Schwartz and Gillespie, the Examiner is constrained to find that Sheldon had complained to Gillespie of censorship by Schwartz and that Schwartz was present when Sheldon had a five-minute conference with Gillespie in the latter's office.

EQUAL OPPORTUNITY

66. Peter Halladay is an announcer-technician at Station WSTC. He recalled that during the 1969 campaign Schwartz instructed him that if Nocerino or Kuczo came to the station with scripts of paid political announcements they were not to be permitted to broadcast until the scripts were reviewed and approved by Schwartz. Halladay asked Schwartz what he should do about Julius Wilensky, the Re-

[17] Schwartz reported that Sheldon came into the studio, stood on his head and did standups with his hands while reciting poetry (Tr. 271).

[17A] As shown by Gillespie's testimony (Tr. 692), Sheldon appeared at his office frequently.

publican mayoral candidate. Schwartz said: "We don't have to worry about him" (Tr. 489–90). In a December 4, 1970 affidavit, Schwartz stated that at the beginning of the 1969 primary campaign he instructed his announcers that no candidate was to be allowed on the air without prior approval of the material by Schwartz (WSTC Ex. 1, p. 4).

67. Schwartz testified that he told *all* candidates individually, that their scripts (including paid political announcements in the candidate's own voice) would have to be reviewed prior to broadcast (Tr. 127–28).[18] However, stated Schwartz, he never had occasion to review Wilensky's scripts because Wilensky appeared on WSTC only once and that involved a round table discussion (Tr. 127–28).[19] Gillespie also indicated that Wilensky did not appear in any paid political announcements (Tr. 95–96). Actually, Wilensky personally appeared with John Martin, a WSTC announcer, on 4 to 8 tapes of paid political announcements which were broadcast over WSTC. As a matter of fact, the Wilensky tapes were made at the WSTC studios and Schwartz met Wilensky at the station then (Tr. 369–70, 375, 377).

68. John Martin has been an announcer at WSTC for over six years (Tr. 364–65). At the time of the 1969 mayoral campaign, Martin hosted a program running from 4:00 p.m. to midnight (Tr. 214). The producer of paid political announcements for the Republicans approached Martin and asked him if he would make spots for the Republican Town Committee. Martin agreed and, thereafter, informed Schwartz that he would be working for the Republican Town Committee as an announcer on his own time and off WSTC premises.[20] Schwartz wanted assurance that Martin would not perform his services for the Republicans during his working hours using station equipment (Tr. 366–68).

69. Whenever Martin made a tape for the Republicans which contained the voice of someone else in addition to his own, he used WSTC's studios. On such occasions, WSTC was paid for the use of its facilities. The tapes were not made during Martin's working hours. Wilensky came to the studio between 4 and 8 times to make tapes. On each visit, Schwartz was present at least to greet the candidate or say good-bye (Tr. 369–70, 373–77).

70. When Wilensky made tapes with Martin he would arrive at the studio with his script. Martin did not review Wilensky's scripts. He never suggested that Wilensky make changes in the script in any way (Tr. 370, 378). Schwartz acknowledged that he did not require Martin to submit the tapes he made for Wilensky for review prior to broad-

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[18] In a statement given to Commission investigators on September 25, 1970, and in an affidavit sworn to on December 4, 1970 (which was submitted to the Commission), Schwartz admitted that he did not ask to review Wilensky's paid political announcements (WSTC Ex. 1, pp. 4–5, 11–12). In his June 19, 1970 statement, which was the first statement that Schwartz gave to the investigators, Schwartz stated that he requested that all candidates submit their scripts to him for approval. In that statement, Schwartz noted that he had no occasion to suggest any changes in Wilensky's scripts, because of confidence in this candidate to conduct a campaign in good taste and also in Leo Miller, who was assisting Mr. Wilensky in the preparation of his announcements.

[19] Schwartz acknowledged that Wilensky's voice may have appeared in some paid political announcements. Schwartz heard many of the Republican spots but does not remember hearing Wilensky (Tr. 311). In his December 4, 1970 affidavit, Schwartz alleged that Wilensky did not personally appear on WSTC (WSTC Ex. 1, p. 5).

[20] As far as Schwartz was concerned, Martin asked him for permission to do work for Wilensky.

cast. Nor did he ask Martin whether Wilensky was appearing personally on the tapes. Schwartz testified that he was not concerned about Wilensky's tapes because he had confidence that Wilensky would not say something that was in bad taste and, furthermore, Martin was cognizant of WSTC's policies (Tr. 212–14). However, Martin indicated that Schwartz did not instruct him regarding the acceptability of political material. Moreover, Martin never evaluated scripts from the point of view of whether they were acceptable to Schwartz. As far as Martin was concerned, he had no responsibility over the contents of the tapes (Tr. 378–82).[21]

71. On the tapes that Martin made for the Republicans he did not identify himself by name (Tr. 369). He and supporters of Wilensky taped some scripts which promoted the candidacy of Wilensky, and sometimes the tapes were broadcast during Martin's 4:00 p.m. to midnight stint on the air (Tr. 214–15, 372). Martin identified himself to station listeners while on the air during his duty shift (Tr. 372).

72. Initially, Nocerino was given a five-minute spot on Monday evenings immediately preceding the 6:30 p.m. local news. He too was interested in having his weekly five-minute broadcast appear adjacent to WSTC's 6:30 p.m. local news program. He had asked Schwartz for a Monday evening, five-minute spot, adjacent to the local news to run from September 8 through election day (WSTC Ex. 12, Tr. 396–98, 402). After the Democratic primary election in Stamford, Schwartz informed Nocerino that he had forgotten the Republicans had previously purchased a one-minute spot immediately preceding the 6:30 local news (Tr. 173, 400–02). Schwartz offered Nocerino a choice of continuing his weekly Monday evening broadcasts at 6:55, 7:05 or 7:35 p.m. At first, Nocerino objected to the changes in time but after seeing he had no choice agreed, at Schwartz's suggestion as to which was the best alternative, to take the 6:55 p.m. slot which is adjacent to the network's world news (Tr. 173, 402).

73. In late August, 1969, the Republicans purchased time on WSTC for the upcoming campaign. Some of the spots were to run from September 29 through election day. Other spots were to begin on October 13 and continue through election day. One of the spots scheduled from September 29 was a one-minute spot at 6:30 p.m. The Republicans also purchased a 6:40 p.m. spot to begin on October 13. WSTC broadcasts a local news program from 6:30–6:40 in the evening (WSTC Ex. 10; Tr. 174–76; 182). Adjacencies to the major local newscasts such as the 6:30 p.m. news are favored by candidates for their paid political announcements. Schwartz assumed that this is because they believe that WSTC has a large audience for its local news. Although no studies have been done, Schwartz also believes that the audiences are large for the local news (Tr. 174–75, 178).

74. Schwartz had to reschedule Nocerino's spot as he did because it was WSTC's policy not to have the paid political announcements of competing candidates broadcast back-to-back. That is why Schwartz

[21] Schwartz recalled one instance in which the broadcast of a Republican Town Committee paid political announcement in support of Wilensky evoked a protest from Paul Kuczo's sister. Schwartz listened to the tape after receiving the complaint, found it to be in bad taste ("name calling"), and took it off the air. Schwartz does not know how many times the tape had been broadcast. The tape did not contain a candidate's voice (Tr. 216–19).

did not even consider having Nocerino's spot broadcast begin at 6:24 instead of 6:25. Schwartz indicated that the no back-to-back policy was his and that he never discussed it with Gillespie. Schwartz testified that conflicting paid political announcements were separated by a minimum of 10 to 15 minutes (Tr. 178–80). Gillespie testified that he had instituted the policy of not having paid political announcements by competing candidates broadcast back-to-back. However, Gillespie's policy did not include a specific separation period (Tr. 57). WSTC has broadcast back-to-back paid political announcements by candidates who were not seeking the same office (Tr. 179–80).

75. Schwartz indicated that the spot immediately following the 6:30 local news was not available to Nocerino because the Republicans had purchased that spot beginning October 13. Schwartz did not want to have to reschedule Nocerino's broadcasts a second time (Tr. 181–82). However, on November 3 (election day eve), the Republicans had spots broadcast at 6:29 and 6:38 while Kuczo had a paid political announcement running from 6:40 to 6:53. Kuczo's broadcast was followed at 6:55 by Nocerino's regular Monday night five-minute program (Tr. 182). Schwartz explained that because November 3 was the day before election day, WSTC had additional requests for political time and accepted all of them. That is why there was a departure from the station's policy regarding the scheduling of political broadcasts by competing candidates (Tr. 302).

76. For the past seven years WSTC has broadcast the "Italian Melodies" program on Sundays. The program, which is hosted by Vincent Martino, a school teacher, consists of Italian music and news of interest to the Italian community with commercial announcements by Martino interspersed (Tr. 186–87, 604–05). WSTC has a policy proscribing the use of foreign languages on the air. This policy applies to political announcements. Gillespie believes that broadcasts of a foreign language is not in the best interest of those who do not speak the language (Tr. 58, 186). Martino acknowledged that he ignores the no foreign language rule once in a while by congratulating people for birthdays, anniversaries and weddings in Italian. He does this because he feels that some of his audience do not understand English. On these occasions only a few words are spoken in Italian (Tr. 605).

77. During the 1969 campaign, Norcerino spoke to Schwartz about purchasing a five-minute slot within Martino's "Italian Melodies" program, with the purpose of reaching the Italian vote. He told Schwartz that he wanted to have a question and answer format with Martino asking questions in Italian and one of Nocerino's supporters answering in Italian. Schwartz informed Nocerino that he could not use Italian (Tr. 430–31).[22] Since he could not use Italian, Nocerino told Schwartz that he would do the program in English with Martino asking questions and Nocerino supplying the answers (Tr. 432). Nocerino then

[22] Schwartz himself did not recall whether Nocerino had purchased time on "Italian Melodies" and he denied that Nocerino asked him whether he could use Italian. He thinks that Nocerino asked Martino (Tr. 187). Martino, however, recalled that Nocerino had told him that he would be having a five-minute spot done in Italian. Martino thereupon expressed surprise because he had never been permitted to speak Italian on his program. Martino testified that the next day he saw Nocerino who was upset and told him the program could not be done in Italian (Tr. 615). In view of the distinct recollection of the other witnesses about the incident, the Examiner does not credit Schwartz's denial.

purchased a five-minute spot during Martino's October 19 "Italian Melodies" program (Tr. 187–88).

78. When Nocerino arrived at WSTC studios on October 19, he had with him a typed script calling for questions by Martino and answers by Nocerino. He brought the script to Schwartz to be reviewed. Schwartz then informed Nocerino that Martino does not participate in political programs. Schwartz placed lines through Martino's name wherever it appeared on the script (Bureau Ex. 6; Tr. 190–91, 434). Martino was instructed by Schwartz that he could not appear on the question and answer program (Tr. 616). Nocerino, after being introduced by Martino, went on the air asking and answering his own questions (Tr. 436, 617).

79. Schwartz testified that he did not permit Nocerino to use Martino because of station policy that staff members do not appear in political programs. This policy applies whether or not candidates are also appearing on the broadcast. Under the policy, the WSTC staff does not participate in political broadcasts of any kind, except on forums involving all the candidates (Tr. 191).

80. During the 1969 mayoral campaign, Martino hosted a political program on behalf of supporters of Wilensky's candidacy. On November 2, 1969, Martino had broadcast his regular "Italian Melodies" program and had returned to his home. He received a telephone call from Schwartz who told him to come back to the WSTC studios because he was going to do a special edition of his program. A group of Italian residents in Stamford, calling themselves "Friends of Wilensky" had purchased time from Schwartz that same day for the special program which went on the air at 3:17 in the afternoon (Tr. 193–95, 605–06). The program ran for one hour (Tr. 610).

81. Martino returned to the studio shortly before the program was scheduled to go on the air. Schwartz gave him a script which Martino recalls as being on one sheet of yellow paper. The paper, according to Martino, only contained a list of the people who were sponsoring the program. Martino recalls that Schwartz instructed him to read the names in Italian (Tr. 606–07, 609–12).

82. Schwartz was not in the studio when Martino broadcast the special program. Nor did he listen to the program on the radio. Schwartz did not know whether or not the "Friends of Wilensky" had a script. Schwartz admits that he had no idea what the "Friends of Wilensky" intended to do with the hour of time they purchased. Schwartz assumed, however, that the "Friends of Wilensky" had purchased the time in order to promote their candidate with statements made in his behalf. He did not ask them to submit any such statements for review because it was a last minute arrangement. The only instructions Schwartz gave to Martino were that he duplicate his "Italian Melodies" program.[23] Schwartz did not remember whether he instructed Martino that he could make political announcements during the program "but if it was a paid political broadcast, he probably could

[23] Martino testified that Schwartz instructed him to read the names of the individuals who formed the "Friends of Wilensky" in Italian. Schwartz denied that he knew that any list of names would be read (Tr. 199). In his June 19, 1970, statement to FCC investigators, Schwartz acknowledged that Martino pronounced the names in Italian, but claimed that this was done without his approval (WSTC Ex. 1, p. 10).

have." [24] Schwartz did not know the individuals who called themselves the "Friends of Wilensky" (Tr. 197–201).

83. Martino testified that the special program he did for the "Friends of Wilensky" consisted of the playing of records interspersed with the reading of the yellow paper that he received from Schwartz. The only Italian he remembers using was in the pronunciation of the sponsors. However, when asked whether he used any Italian phrases which praised Wilensky, Martino said that if the phrases were on the paper, he probably read them. Martino denied that he made any statements, in Italian, or English, which were in support of Wilensky or derogatory of the other candidates (Tr. 608–10).

84. A. S. Esposito is a Commissioner of the City of Stamford who supported Wilensky in 1969. He was part of the "Friends of Wilensky" and handled the purchase of the special Martino program for which he personally paid. Esposito brought a script on a white sheet of paper (Martino testified he had a yellow script) to Schwartz (who testified he never saw a script) and told Schwartz that he wanted Martino to do a special edition of his program. Esposito informed Schwartz that he wanted Martino to read the script but said nothing about reading names with an Italian pronunciation. Esposito heard the program. As far as Esposito is concerned, Martino played records and read the script. According to Esposito, Martino did not make any comments which were not on the script (Tr. 635–37, 644–46).

85. Esposito produced a copy of the script he had given to Schwartz. It said "West Side Democrats and Republicans support and will vote for Wilensky and Clapes." This sentence was followed by a list of the names of eight individuals with an Italian region inserted next to each name. Esposito believes that Martino pronounced the first names of the sponsors in Italian. Esposito indicated that Martino also introduced the songs in Italian and supplied, in Italian, an explanation of the meaning of the songs. But he testified that Martino did not say things such as "Wilensky would be a good mayor" either in Italian or English (Tr. 642–43, 645, 654–56).

86. Martino testified that he did not remember any advertising for candidates in 1969 other than the special program for the "Friends of Wilensky" (Tr. 618–19). Esposito testified that he did not know whether the "Friends of Wilensky" purchased any other time during the 1969 campaign and that, if they did, he would not have been the person who was billed. Actually, the "Friends of Wilensky" purchased the time for one program and five announcements on WSTC during the period of November 2–4, 1969. Moreover, Esposito received the bill for these purchases and had the original bill with him at the hearing. The bill also indicates that the "Friends of Wilensky" had a tape made at WSTC. With his memory refreshed, Esposito recalled that Martino made at least one tape for the "Friends of Wilensky" but he did not know the contents of the tape or tapes (Bureau Ex. 11; Tr. 647–52, 657–58).

87. John Nocerino testified he heard Martino promote Wilensky's candidacy in Italian. Nocerino recalls that on the Sunday before election day he heard a segment of a program on which Martino spoke in

[24] The special edition of "Italian Melodies" was logged as political (Tr. 198).

English and Italian. According to Nocerino, Martino used Italian phrases describing Wilensky as a "beautiful man." In Italian and English, Nocerino testified, Martino urged his listeners to vote for Wilensky. Nocerino listened to approximately ten minutes of the program. During approximately half of that time, Martino was speaking about Wilensky. Martino also broadcast music during the program. Nocerino indicated that he understands Italian but cannot speak the language. He could not repeat any of the Italian phrases spoken by Martino (Tr. 431, 436–41).

88. Paul Kuczo's brother, John, has known Vincent Martino since 1960. He testified he has heard Martino introduce songs in Italian on the program "Italian Hour". On the Sunday prior to election day, John Kuczo heard Martino using Italian in political announcements on WSTC. Although Kuczo does not understand Italian, he recognized that Martino was mentioning Julius Wilensky (Tr. 675–78). Paul Kuczo testified further that, during the campaign, he had asked Schwartz whether he could use a foreign language in paid political announcements and was told that station policy prohibited it (Tr. 358). John Kuczo was an aide to his brother during the campaign. He spoke to Martino the day after the special "Italian Hour" broadcast and asked him why Martino had broadcast the political material in Italian. Martino responded that he had to do it or he would have lost his job (Tr. 679).

89. The testimony of Mr. Martino and Mr. Esposito clearly establishes that during the special "Italian Melodies" program on November 2, 1969, Martino announced the names of the "Friends of Wilensky" in Italian and also identified in Italian the region in Italy from which each individual came. Despite Schwartz's denial, Martino's testimony, which the Examiner credits, makes clear that he acted pursuant to instructions from Schwartz in the use of Italian. The sharp conflict between the testimony of Martino and Esposito on the one hand and of John Nocerino and John Kuczo on the other as to whether Martino used laudatory Italian phrases promoting Wilensky's candidacy cannot be resolved. Since Esposito purchased and heard the program and Martino announced the program and neither had any apparent motive for testifying falsely, the Examiner finds no reason to prefer the testimony of Nocerino and Kuczo. It is noteworthy that Nocerino could not repeat any of the Italian phrases he asserted Martino had spoken and that Kuczo does not understand Italian. Conceivably, both heard only the names of persons and places which Martino gave in Italian and the deep impression made by this led to some expansion in their recollections. In any event, the record does not permit a finding that Martino spoke other than the names of persons and places in Italian.

LICENSEE MISREPRESENTATION OR LACK OF CANDOR ISSUE

Julian Schwartz

90. Prior to testifying at the hearing, Julian Schwartz gave two statements to the Commission's investigators. He also executed an affidavit which was submitted as part of WSTC's Petition for Reconsideration. In his June 19, 1970 statement, the first one, Mr. Schwartz

denied that he censored or deleted material from any paid political announcements or broadcast made by candidates during the 1969 mayoral campaign (WSTC Ex. 1, p. 8). He stated:

> I have been informed that allegations have been made that I censored or deleted material from the paid political announcements or programs purchased by candidates in the 1969 Stamford mayoralty election campaign, both during the primary and during the general election campaign. I did not personally censor or delete anything from any such broadcasts. However, in order to ensure that no name-calling or libelous statements were made on the air by the candidates, I requested that they all submit their proposed tapes or continuity to me prior to broadcast for my review and approval. When I noted anything which I considered objectionable in that respect, I suggested to the candidates that they make certain changes in their scripts. . . . I had no occasion to suggest any changes in the broadcasts submitted by JULIUS WILENSKY, the Republican candidate, to the best of my memory. I do recall that from time to time I found it necessary to suggest to Fusion Party candidate JOHN NOCERINO, and to Democratic candidate Paul KUCZO that they make certain changes in their material. With respect to John NOCERINO, I remember that during the early stages of his campaigning I found it necessary to make frequent suggestions to him that he alter his material to conform to station policy as set forth by me, but as time went on, nearing the latter part of the campaign he became better aware of station policy in that regard and I found it decreasingly necessary to suggest changes to him.

Mr. Schwartz stated too that on the special November 2, 1969 "Italian Melodies" program: "All political announcements were read in English and the names of the individual Italian supporters of Wilensky were pronounced in Italian, but without my approval."

91. On September 25, 1970, Schwartz gave his second statement to the investigators.[25] Schwartz stated that he had examined Nocerino's October 13, October 20 and November 3, 1969 scripts and that the marks striking out the material were not his. Schwartz acknowledged that he might have talked to Nocerino about the material and suggested that the material be removed because it was libelous or in bad taste. However, Schwartz denied that he threatened to bar Nocerino from going on the air if the material was not removed (WSTC Ex. 1, p. 12). There is no evidence that when he gave his statements to the investigators, Schwartz was represented by legal counsel.

92. In his September, 1970 statement to Commission investigators, Schwartz had also acknowledged as follows (WSTC Ex. 1, pp. 11–12):

> I am aware that Section 315 of the Communications Act prohibits a station from requiring paid announcements of candidates for political office to be submitted to the station for review before broadcasting but I think I have a responsibility to the station to prevent the broadcasting of anything libelous or rabble raising from being broadcast and that this is an important responsibility; therefore I have required all candidates to submit their material to me unless I have enough confidence in the candidate that he will conduct a campaign in good taste. With regard to the one minute spot announcements of Julius Wilensky a candidate for mayor of Stamford, Conn. in 1969 I had enough confidence in Leo Miller who was assisting Mr. Wilensky in the preparation of his announcements that I did not ask to review their scripts before they were recorded nor did I review their tapes before broadcasting. I also had enough confidence in Mr. Wilensky. He conducted an entirely different campaign in tone than Kuczo and Nocerino.

93. By December 4, 1970, when he signed the affidavit which was submitted to the Commission by WSTC, Schwartz had recalled that,

[25] Schwartz acknowledged that between June and September he had given the matter considerable thought (Tr. 274–76).

while it was his intention to suggest changes, there were arguments between himself and candidates Nocerino and Kuczo over material in their scripts. Schwartz went so far as to acknowledge that he actually could have insisted upon deletions from the scripts and that he could have made the deletions himself. Although Schwartz could not deny that these events occurred, he still had no independent recollection of making or insisting upon deletions (WSTC Ex. 1, pp. 4–5). Schwartz stated also: "I now realize that I did, in fact, unwittingly violate Section 315 of the Act and Commission regulations during this campaign" (WSTC Ex. 1, p. 6). He asserted that if he had not been under strain during the 1969 election campaign period, he certainly would not have gone to this extreme, because it was out of character for him. Schwartz stated also: "I must stress, however, that my only intention was to assist the candidates and to protect the station" (WSTC Ex. 1, p. 5). In the December, 1970 affidavit, Schwartz described himself as being under "tremendous emotional stress" at the time of the 1969 campaign because of events at the station, particularly the negotiation of a labor contract (WSTC Ex. 1, p. 2). Schwartz also indicated that he was under strain during the campaign because he was suffering from hives, gout, and had personal problems at home (Tr. 280). Gillespie also subscribes to the theory that Schwartz may have acted out of character. He has stated: "I am convinced that if Julian Schwartz did, in fact, mishandle Mr. Nocerino and Mr. Kuczo during the 1969 campaign, this happened as a result of his age and health. Certainly it was an isolated incident in an otherwise distinguished career" (December 4, 1970 affidavit; WSTC Ex. 2, pp. 3–4).

94. The health and mental state of Julian Schwartz is also urged as an explanation for the erroneous statements Schwartz gave to the Commission's investigators. Schwartz claims that as a result of the "stress" he was under at the time of the 1969 campaign and because of the passage of time between the campaign and the statements he gave the investigators in June and in September, 1970, his "memory concerning this period is not as clear as it might be." Schwartz also claims that he was upset by the investigation and had no time to think his answers through carefully or to search his memory concerning the 1969 campaign (WSTC Ex. 1, p. 3). As a result of all these factors, Schwartz asserted in his December, 1970 affidavit:

> I did make certain statements to these investigators that, upon reflection, I feel could and should be modified. My purpose here is to set the record straight. (WSTC Ex. 1, p. 2).

Schwartz has made no mention of factors affecting his memory in his June and September 1970 statements.

95. Testimony as to the physical condition of Mr. Schwartz in 1969 has been discussed in Paragraphs 18 and 19, *supra*. It should be added that during 1969, Dr. Sherman, his internist, saw Schwartz more frequently than before when Schwartz had been examined every two or three months. Schwartz, who is 70 years old, has been a patient of Dr. Sherman since 1949. From the health point of view 1969 was a particularly bad year for Schwartz because of a series of illnesses he was experiencing. Dr. Sherman saw Schwartz in his office once in January, once in April, once in July, three times in August, once

in September and once in November. He also saw Schwartz at the patient's home three times during the last quarter of the year (he did not have the exact dates for those visits). Difficulty with hives persisted on and off throughout the fall of 1969. Dr. Sherman attributed episodes of hives and angioneurotic edema to anxiety and tensions. While Dr. Sherman testified Schwartz might have had lapses of memory of a temporary nature, he had no record of Schwartz having complained of suffering from a lapse of memory during the latter part of 1969. He did not diagnose memory lapse as a problem (Tr. 589–599). He said that memory lapses are associated with advancing age (Tr. 601). Dr. Sherman testified that if a person suffers a complete loss of memory, usually he forgets everything that happened as to the period in question. He agreed that stress or preoccupation with a matter can so effect the power of concentration at a particular time so that a person may not be able to recall later what was happening at the time (Tr. 600). Schwartz told Dr. Sherman that labor negotiations were the main source of his tension problem (Tr. 599). The labor negotiations in question began in early October, 1969 and continued through the spring of 1970 (Tr. 626).

Kingsley Gillespie

96. Kingsley Gillespie gave a statement to Commission investigators on September 25, 1970. After asserting that he has full confidence in Mr. Schwartz as a newsman and in dealing with political candidates, Gillespie stated:

> I have not deemed it necessary to give him specific instructions for reviewing paid political broadcasts, however I am aware of his policy of requiring candidates to submit their scripts to him before being broadcast, and I have accepted this judgment.
>
> * * * * * * *
>
> I concur in his policy that all matters broadcast over the station shall not contain libelous material or material that is not in good taste. I expect this policy to be applied to all candidates with uniformity and no discrimination. I would expect that he would watch more carefully a new candidate because of his lack of experience as a candidate and as such he might attempt to broadcast libelous matter or matters in bad taste (WSTC Ex. 2, p. 2).

In an affidavit executed by Mr. Gillespie on December 4, 1970, and submitted to the Commission in support of the licensee's Petition For Reconsideration of the Show Cause Order, he stated, *inter alia:*

> 5. I was aware of his (Schwartz's) policy of requiring candidates to submit their scripts to him before being broadcast, but I was not aware that this violated any regulation of the Federal Communications Commission or any federal statute. I, therefore, accepted his judgment with full confidence that he would not discriminate among candidates.
>
> 6. *I was shocked and distressed to learn that during the 1969 campaign Julian Schwartz was accused of requiring the deletion of material from the speeches of John Nocerino and Paul Kuczo, so much so that I found it difficult to accept.* (Underscoring supplied)
>
> 7. In the 23 years that Julian Schwartz managed the Stations nothing of this sort ever happened. In fact, except for the technical matters discovered in routine inspections, the Stations have never before been accused of violating any rule or statute. To my knowledge no complaint of any substance has been made against them. Principally because of the dedication and ability of Julian Schwartz, WSTC and WSTC FM enjoyed a reputation for fairness and impartiality in news coverage and in the treatment of political candidates.

8. I am convinced that if Julian Schwartz did, in fact, mishandle Mr. Nocerino and Mr. Kuczo during the 1969 campaign, this happened as a result of his age and health. Certainly it was an isolated incident in an otherwise distinguished career (WSTC Ex. 2, pp. 3–4).

97. In the Petition for Reconsideration filed by Western on December 7, 1970, and affirmed by Gillespie, it was stated that he did not know of any complaints by candidates until "long after the fact" (Petition for Reconsideration, p. 16, par. 38. Official Notice taken Tr. 123–24). At the hearing, Mr. Gillespie's attention was directed to this statement and he was asked when Schwartz notified him that Nocerino made a certain statement (the addendum) after his last broadcast. Gillespie answered: "I would be estimating, but I would say two or three days after the broadcast". Gillespie explained that "two or three days" is what he had reference to where the Petition for Reconsideration indicated no complaints came to his attention until long after the fact (Tr. 125). Schwartz's testimony established that he told Gillespie about Nocerino's addendum the morning after the broadcast (Tr. 185).

98. When Gillespie testified three days later he had given the matter a great deal of thought and offered the following explanation: Schwartz came to his office two or three days after Nocerino had broadcast his addendum and told Gillespie of the broadcast.[26] Schwartz did not have a copy of the addendum with him. Schwartz reported the substance of Nocerino's allegations. Gillespie evaluated Nocerino's allegations and threats to complain to the FCC and bring suit from the point of view that candidates say things the day before election day that "you don't really think they mean." Gillespie did not believe there was anything he could do about Nocerino's remarks as the broadcast had already been made. Consequently, he "dismissed it as something that you expect a candidate to do the night before election" (Tr. 688–90). He conceded that, viewed from hindsight, perhaps he did not attach as much importance to the addendum as he should have (Tr. 689).

99. In view of the extraordinary nature of the incident and Schwartz's practice of keeping Gillespie informed almost daily of developments at the station, it is highly improbable that Schwartz failed to report the broadcast of the unreviewed addendum to Gillespie on the very day it came to Schwartz's attention, notwithstanding Gillespie's claim they were both busy on election day. Therefore, Schwartz's version of when the report of Nocerino's broadcast was made to Gillespie is credited in preference to that of Gillespie. Further, for Gillespie to confirm in the statement made in the Petition for Reconsideration that he was not aware of complaints until "long after the fact" was an inexcusable exaggeration.

100. In an affidavit executed by Mr. Gillespie on September 28, 1971, and submitted to the Commission,[27] reference was made to involvement in a revocation hearing concerning the question whether he censored

[26] ". . . To the best of my recollection", Gillespie testified, "it was two or three days later because the following day was election day and we both were very busy on election day and my recollection is that it was during the following week that he told me this story. . . ." (Tr. 689).

[27] This affidavit was submitted by way of supplementation of earlier affidavits submitted by Mr. Gillespie. In point of fact, Mr. Sheldon was not a candidate for mayor in 1969.

certain political broadcasts during the 1969 Stamford mayoralty political campaign. This affidavit stated, in pertinent part:

> . . . We now find, and have only recently learned, that Mr. Ralph Sheldon, a candidate for office in 1969, contends that (1) Mr. Julian Schwartz censored his scripts and (2) I was aware of it because he complained to me personally. Mr. Schwartz does not so recollect (i.e., his memory of this period is not clear). Although Mr. Sheldon has come to my office on several occasions with criticisms of the newspaper, prior to his visit to my office on September 16, 1971, he never complained that Julian Schwartz censored his material. I have no knowledge of the facts other than what Mr. Sheldon told me recently and as outlined herein. (WSTC Ex. 5, p. 2)

101. The testimony of Mr. Sheldon, which the Examiner has found worthy of belief, unquestionably established that in 1968 he had complained of censorship by Mr. Schwartz. Therefore Gillespie's statement that Sheldon had made no such complaint prior to September 1971 was not true. Indeed, Sheldon had complained on more than one occasion in 1968, and notably during a meeting in Gillespie's office by appointment when Mr. Schwartz also was present (Tr. 510). Possibly Gillespie did not recall the meeting because he had turned a deaf ear to Sheldon's plaint by indicating that Sheldon's radio station problems would have to be handled entirely with Schwartz (Tr. 510–11). On other occasions Sheldon voiced his discontent while standing in the doorway to Gillespie's office, certainly not a very effective way of registering a protest against censorship or making an impression upon Gillespie.

GILLESPIE CONCESSION AND DISCLAIMER

102. Mr. Gillespie, in testifying, conceded that Mr. Schwartz had not acted properly during the 1969 campaign insofar as the handling of political programs and spot announcements are concerned (Tr. 701). While acknowledging that as the chief officer of WSTC he bears a responsibility for what everyone in the organization does, Gillespie claimed that he was blameless insofar as Schwartz acted without his knowledge in going beyond the area of making suggestions to candidates with regard to their political scripts. Gillespie maintained that he did not concur in any proposal or action on Schwartz's part which amounted to preventing a candidate from airing political material if the candidate chose not to agree with a proposed correction or deletion (Tr. 702–03).

POLITICAL ASPECTS

103. Kingsley Gillespie is a registered Republican (Tr. 712). He has never been an active political campaigner or otherwise active in politics (Tr. 699, 713). The Editor and Publisher Yearbook lists the Stamford *Advocate* as an Independent-Republican newspaper [28] but Gillespie considers it to be an Independent in its point of view politically. In 1969, the *Advocate* in an editorial endorsed Wilensky for mayor two working days (a Saturday), prior to the election (Western Ex. 6, p. 13; Tr. 694). The editorial, while stressing desirable qualities found in Wilensky, was not unkindly or harshly critical in appraising his opponents (Western Ex. 6, p. 13). Although the *Advocate* has endorsed Democrats for Senator or Governor, it has never

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endorsed a Democratic candidate for mayor of Stamford within Gillespie's recollection. On occasion the *Advocate* has liked the Democratic candidate for mayor—and has refrained from endorsing any candidate for the office (Tr. 697–98, 711). Gillespie "has been close to several Democratic Mayors" (Tr. 712).

104. The editorial endorsing Wilensky was approved by Gillespie. Although Gillespie did not campaign for Wilensky, he did contribute either to the Republican Town Committee or the State Finance Committee in 1969 (Tr. 699–701, 712–13). WSTC has never endorsed a candidate (Tr. 698). There is no evidence that Schwartz has been active in politics (Tr. 699). Gillespie testified that there was no connection between the manner in which Schwartz handled political scripts in 1969 and the fact that the *Advocate* endorsed Wilensky (Tr. 699). Julian Schwartz played no part in the decision to endorse Wilensky (Tr. 701).

MOTIVES AND REPUTATION OF SCHWARTZ

105. Julian Schwartz testified that, even though he did cross out in their presence parts of candidates' scripts which were objectionable, nothing he did was with the intent of favoring one candidate over the others (Tr. 308). The fact that he urged deletions of Nocerino material critical of Kuczo as well as Wilensky (Pars. 38–41, *supra*, see findings), corroborates this testimony, as does the fact that he took a Wilensky announcement critical of Kuczo off the air (see fn. 21, *supra*). There is no evidence that Schwartz was politically active or had any personal interest in the outcome of the 1969 campaign (Tr. 699). Nor does it appear from the record that Station WSTC expressed a preference for any candidate (Tr. 698).

106. Western introduced a number of affidavits of community leaders, one purpose of which was to establish the good reputation of Julian Schwartz (Tr. 756). All those who commented on his personal qualities of truthfulness, integrity or honesty indicated that his reputation in these respects was of a high order (see Western Ex. 7, pp. 134, 142, 144, 145, 147, 158, 159, 162, 179).

ISSUES (c) AND (d)—LOGGING AND PUBLIC INSPECTION

107. During the period from October 13, 1969 to June 19, 1970, WSTC did not maintain for public inspection a list of the chief executives, officers or members of the executive committees which purchased time for political announcements and programs (Stipulation No. 1; Tr. 263–64). Mr. Schwartz testified that "at some time" in 1969 such a list, which "was not complete", was maintained but there is no factual definition of these phrases in the record. By way of explaining the difficulty of compiling a list because campaigns were loosely and informally organized, he testified: ". . . very often you could ask for lists of officers and nobody knew who it was or nobody knew whether it was an officer and it was only in most cases . . . the candidate himself plus whoever was writing his checks unless it

[23] This designation appeared before Gillespie became associated with the newspaper in 1942. Gillespie either did not think it was significant enough to change or he overlooked doing so (Tr. 697).

was the Republican Town Committee or The Democratic City Committee." (Tr. 262) Schwartz knew keeping a list was required and he thought it was being done (Tr. 260).

108. On the WSTC and WSTC–FM program logs for October 13, 20 and 27, as well as November 3, 1969, there were approximately 150 entries from which it appears that a sponsored announcement had been broadcast for a political candidate. But approximately 142 of those entries did not include any notation to show the type of program. Moreover, approximately 85 entries did not indicate the party affiliation of the candidate. Additionally, approximately 62 entries failed to show the candidate's name. Finally, none of the entries included any notation such as a checkmark to show that announcements concerning sponsorship were made (Stipulation No. 2; Tr. 264). There is, however, evidence which suggests that sponsorship identification was in fact given when political announcements were broadcast by WSTC (Tr. 371). Although afforded the opportunity to do so, Mr. Schwartz gave no explanation for the omissions (Tr. 264). He did state that he did not personally review the logs in their entirety. This was a responsibility placed upon the program director and the bookkeeping department. He gave no specific instructions on log keeping because he assumed the program director knew what to do (Tr. 258–60).

CORRECTIVE ACTION BY LICENSEE

109. All of the candidates testifying at the hearing who were also running in 1971 acknowledged that they were being treated fairly by the station (Tr. 451–52 [Nocerino]; 487 [Giordano]; 520, 522 [Sheldon]). All requests for political advertising time is now approved by the new general manager, Robert J. McCullough (Tr. 707–08). He testified that now the station will not look at the scripts of candidates for any purpose whatsoever, and that if a candidate asked him to look at a script, he would refuse (Tr. 663–64). McCullough also testified that if any complaints were received from a candidate, he would personally investigate them and contact counsel (Tr. 664). Judge Maurice Buckley is a director of Western Connecticut, and he testified that legal problems, including those involving political candidates, would be submitted to him and that he would look to an expert in the field for assistance (Tr. 624–25).

110. McCullough also testified that upon coming to the station he obtained instructions on proper logging procedures from Washington counsel. Each day's log, he said, is checked by him personally and by the programming coordinator. Communications counsel also check the logs frequently (Tr. 662), as does Kingsley Gillespie (Tr. 707).

111. McCullough testified too that the station now keeps a complete list of anyone asking to buy political time on the station and the disposition of that request. The public file also contains a complete record of all officers and directors of committees or organizations buying time on behalf of a candidate, as well as records of all candidates who buy time for themselves. (Tr. 662–63).

112. Kingsley Gillespie testified that since the studios were moved from a third floor walk-up to a new building,[29] his role in the day-to-day operation of the station has substantially increased. He is now at the station for about two hours, four mornings a week (Tr. 707, 709). He stated, "after the citation and the experiences that went with it, I think we're all more alert than we were before" (Tr. 707). Western has retained communications counsel and proposes to do so in the future (Tr. 706).

MERITORIOUS PROGRAMING—ISSUE (g)

113. In response to the meritorious programming issue, Western Connecticut introduced evidence dealing with eight specific areas of the stations' programming performance: ascertainment; absolute and comparative performance during composite weeks; "public affairs" and "other programming"; news programs; community services; community leaders' evaluations of the stations' public service programming contributions; and awards received by the station (Western Ex. 7, and Ex. 14).

A. *Composite Week Data—*

114. Data reflecting programming[30] during the Commission's 1969 and 1970 composite weeks[31] was compiled in accordance with prescribed Commission procedures and regulations regarding program classifications and exclusion of commercial matter in making the computations.[32] Statistically, the breakdown is as follows:

1969 COMPOSITE WEEK

(Total hours of operation: 128 hours, 59 minutes)

	Hours	Minutes	Percent of total time on air
News[33]	39	1	30.25
Local news[34]	15	56	12.35
Network news	23	5	17.90
Public affairs	9	6	7.05
Other	8	55	6.91

[33] In addition, during the 1969 composite week, 2 hours, 30 minutes, or 1.94% of total air time, was devoted to sports news reports.

[34] The figure for "local news" includes all time (exclusive of commercials) devoted to locally-produced newscasts. Such newscasts were prepared in their entirety by the WSTC news staff and featured local and regional news, as well as national and international stories involving Stamford area residents. The figure also includes an average of 2½ minutes per day of locally-compiled world and local news headlines at sign on and approximately ten minutes per day of locally-compiled world, state and local news. "Locally-compiled" means news prepared by the WSTC news staff from local and wire service sources (Western Ex. 14, p. 2).

[29] Since July 6, 1971, WSTC has been operating from studios in a new building at 117 Prospect Street (Tr. 50). This building was constructed by Western Connecticut at a cost of over $800,000 (Petition for Reconsideration, p. 18, fn. 5).

[30] Western Ex. 7, pp. 1–42. Since WSTC–FM was substantially duplicating the programming of WSTC during the period covered by the 1969 and 1970 composite weeks—WSTC–FM was separatecast from 11 a.m. to 4 p.m.—composite week data was compiled for WSTC only. WSTC–FM's separatecasting consisted of music, with five-minute news breaks at fifteen minutes before and after the hour (Western Ex. 7, p. 1, fn. 1).

[31] All of the dates in the 1969 and 1970 composite weeks were prior to October 8, 1970, the date of the Order to Show Cause and Notice of Apparent Liability (Western Ex. 7, p. 1, fn. 2).

[32] Western Ex. 7, pp. 1 and 2; and Ex. 14, p. 1. In order to compile that data, all WSTC program logs for the 1969 and 1970 composite weeks were reviewed; where necessary, program classifications were corrected, utilizing prescribed Commission definitions and procedures (Western Ex. 14, pp. 1–2).

1970 COMPOSITE WEEK

(Total hours of operation: 126 hours)

	Hours	Minutes	Percent of total time on air
News [35]	35	10	27.91
Local news	15	12	12.06
Network news	19	58	15.85
Public affairs	5	41	4.51
Other	9	26	7.49

[35] In addition, during the 1970 composite week, 2 hours, 54 minutes, or 2.30% of total air time, was devoted to sports news reports.

115. Of the Public Affairs programming broadcast by WSTC during the 1969 and 1970 composite weeks, 4 hours, 30 minutes were produced in composite week 1969 and 4 hours 30 minutes were locally produced in composite week 1970 (Attachment C to WSTC Ex. 7). WSTC decreased its Public Affairs programming in composite week 1970 by 2 hours 15 minutes (36%), compared to composite week 1969, but maintained the same number of broadcast hours for locally produced Public Affairs programming for each year (WSTC Ex. 7).

116. "Public Affairs" includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national and international public affairs (Rule 73.112, note 1). Programs included in the "Other" category are those falling under the definitions of "Religious" programs, "Instructional" programs, and "Other" programs, as defined in Note 1 (e), (f) and (h) to Section 73.112 of the Rules, respectively. See also Section IV–A, pages i and ii to FCC Form 303.

117. During the 1969 composite week, WSTC broadcast nineteen separate "public affairs" programs, eight of which were locally-produced (Western Ex. 14, pp. 225–228). Those eight locally-produced programs accounted for 4 hours, 42 minutes, or 70% of the time devoted to "public affairs" programming during the composite week.

118. In the 1969 composite week, WSTC also broadcast twenty-four separate programs in the "Other" category, not including the regular "Helco Almanac", "Theater Billboard" and "Bulletin Board" programs (Western Ex. 7, pp. 33–38, pp. 104–107). Of these, eight were locally-produced and accounted for 3 hours, 36 minutes, or 40.4% of the "all other" programming broadcast during the composite week.

119. During the 1970 composite week, WSTC broadcast fifteen separate "public affairs" programs, ten of which were locally-produced (Western Ex. 14, pp. 225–228). Those ten locally-produced programs accounted for 4 hours, 39 minutes, or 82.1% of the time devoted to "public affairs" programming during the 1970 composite week.

120. During the 1970 composite week, WSTC also broadcast twenty-seven separate programs in the "Other" category, not including the regular "Helco Almanac", "Theater Billboard" and "Bulletin Board" programs (Western Ex. 7, pp. 33–38, 104–107; Western Ex. 14, p. 3). Fourteen of those were locally-produced, and accounted for 4 hours, 21 minutes, or 46.1% of the "Other" programming broadcast during the composite week.

121. During the 1969 and 1970 composite weeks, WSTC also broadcast on a daily, or near daily basis, "Theater Billboard", a program giving the times and showings of local theaters; "Helco Almanac", a program concerning weather and seasonal conditions; and "Bulletin Board", a program giving information regarding local events and organizations (Western Ex. 7, pp. 36–38). During the two composite weeks "Bulletin Board" announcements were made on behalf of over 45 local, civic and charitable organizations (*Id.*).

122. Finally, during the two composite weeks, WSTC broadcast nine individual entertainment programs designed for ethnic groups or young people, and three sporting events, one of which was a local golf tournament and another, a local high-school football game (Western Ex. 7, pp. 38–39).

B. *Comparison With Other Stations—*

123. Western Connecticut also submitted information concerning the programming of 45 other Class IV radio stations (Western Ex. 7, pp. 44–88). Those stations included all of the Class IV stations listed in the 1971 *Broadcasting Yearbook* which were located in New York, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and operate on the same frequency as WSTC, 1400 kHz, and on the two immediately adjacent Class IV frequencies, 1340 kHz and 1450 kHz. In addition, all Class IV stations in Connecticut were included in the 45 station study (Tr. 559; Western Ex. 7, p. 7).

124. The average past performance of these 45 stations, as reflected in information for the most recent composite week submitted to the Commission with their 1968 renewal applications, compares with WSTC's performance during the 1969 and 1970 composite weeks as follows:

	Average of 45 other class IV stations [36]	WSTC–1969 composite week [37]	WSTC–1970 composite week [37]
News:			
Hours and minutes	20 hours 50 minutes	39 hours 1 minute	35 hours 10 minutes.
Percent of total time on air	16.2 percent	30.25 percent	27.91 percent.
Public affairs:			
Hours and minutes	5 hours 49 minutes	9 hours 6 minutes	5 hours 41 minutes.
Percent of total time on air	4.7 percent	7.06 percent	4.51 percent.
All other programs:			
Hours and minutes	6 hours 50 minutes	8 hours 55 minutes	9 hours 26 minutes.
Percent of total time on air	5.6 percent	6.91 percent	7.49 percent.

[36] Data compiled from Western Ex. 7, pp. 44–87.
[37] Western Ex. 7, pp. 10–11.

125. In the 1969 composite week of 128 hours, 59 minutes, WSTC devoted a total of 57 hours and 2 minutes, or 44.2% of time on air to programming in the above-mentioned composite week categories (WSTC Ex. 7; p. 10); the comparable figure for the 1970 composite week of 126 hours was 50 hours and 17 minutes, or 39.9% of total time on air (WSTC Ex. 7, p. 11). By contrast, the average amount of time the other 45 Class IV stations devoted to composite week category programming was 33 hours and 29 minutes, or 26.9% of their average broadcast week of 124 hours and 21 minutes (WSTC Ex. 7, pp. 44–88).

126. Analysis of the past programming shown for the other Class IV stations resulted in the following data as a basis for comparison

with WSTC's 1969 and 1970 composite week: As compared with 39 hours and 1 minute (30.25%) in 1969 and 35 hours and 10 minutes of News for WSTC (27.91%) in 1970, 20 stations broadcast from 20 to 30 hours of News and 23 stations broadcast from 10 to 20 hours in this category. As compared with 9 hours and 6 minutes in 1969 (7.06%) and 5 hours and 41 minutes (4.51%) of Public Affairs for WSTC in 1970, 5 stations broadcast 10–15 hours; 1 station, 8–10 hours; 8 stations, 5–8 hours; 10 stations, 3–5 hours; and 18 stations, 1–3 hours. Finally, as compared with 8 hours and 55 minutes in 1969 (6.91%) and "Other" programming of 9 hours, 26 minutes (7.49%), by WSTC in 1970, 10 stations broadcast 10–15 hours; 22 stations, 5–10 hours; and 13 stations, 0–5 hours.

127. WSTC's ranking in comparison with these other 45 stations is as follows:

	WSTC rank (based on 1969 composite week)	WSTC rank (based on 1970 composite week)
Time devoted to news	1	2
News percent	1	1
Time devoted to public affairs	7	13
Public affairs percent	6	13
Time devoted to other programs	13	12
Other programs percent	15	15

(Computed from data in Western Ex. 7, pp. 3, and 44–87.)

128. Review of the WSTC program logs for the 1969 and 1970 composite weeks (WSTC Ex. 14), discloses a substantial reduction in the number of public service announcements (PSA's), broadcast on WSTC.[38] As compared with 55 minutes and 20 seconds devoted to PSA's in the 1969 composite week, only 32 minutes and 35 seconds of broadcast time were utilized by WSTC–AM for PSA's in the 1970 composite week, which was about a 40% decrease. On Sunday of the 1969 composite week, 12 minutes and 5 seconds of PSA's were aired by WSTC–AM between 6 a.m. and 10 a.m. Thus, about 22% of total PSA time in the 1969 composite week for WSTC–AM was concentrated in the early Sunday morning period. Slightly less than 50% of PSA time on WSTC–AM in the 1969 composite week was concentrated in the weekend. On Wednesday of this composite week there were only 3 minutes of PSA's on the WSTC–AM station; on Friday and Saturday, there were only 4 minutes of PSA's on this station.

129. In the 1970 composite week, Tuesday's logs reflect only 1 minute and 40 seconds of PSA's, and on Thursday and Friday of that week the AM station carried no PSA's. Approximately 20% of the PSA time for the 1970 composite week was concentrated in the Sunday morning period on WSTC–AM between 6:00 a.m. and 10:00 a.m., and all but one minute was broadcast by that station between 6:00 a.m. and 7:00 a.m. on that day. In the WSTC–AM composite week for 1970, about 36% of PSA time was concentrated on the weekend.

130. WSTC–FM, during the composite week for 1969, broadcast

[38] A detailed tabular analysis by date, time of day and amount of time for PSA's in the composite weeks for 1969 and 1970 was presented by the Broadcast Bureau in Paragraph 95 of its proposed findings of fact.

over 34 minutes more of PSA's than did WSTC–AM.[39] Again, during composite week 1970, the FM station devoted 15 minutes and 15 seconds more time to PSA's (or somewhat less than 50%) than did the AM station. Total time for PSA's in the 1970 composite week on the FM station was about 48 minutes.

131. For the 1969 composite week, WSTC's 160 PSA's exceeded those of 12 other stations among the 45 stations with which compared, but were substantially less than those of the 33 remaining stations in the comparison group (Western Ex. 7, pp. 10, 44–88).[40] When the 1970 composite week for WSTC is compared with the 45 other stations, its 88 PSA's are also substantially less than those of all but 5 of the other Class IV's (Western Ex. 1, p. 11). However, the record reveals no complaint against WSTC for refusal to carry PSA's or with respect to the adequacy or time of scheduling of PSA's.

132. A compilation prepared by the Broadcast Bureau, based on a review of the 1969 and 1970 composite weeks (WSTC Ex. 14), discloses that the time used by WSTC for broadcast of commercial announcements has not been excessive.[41] Nor does the Bureau make any contention to the contrary. In only one period, which occurred between 6:00 a.m. and 10:00 a.m. on Thursday (during morning drive time) in the 1969 composite week did commercial time slightly exceed an average of 18 minutes per hour. For the same period on the following day, the commercial time averages less than 16 minutes per hour. During the FM separatecasting periods shown in the Bureau's tabulation, commercial announcements only once averaged more slightly than three minutes per hour. For the remaining periods shown, FM commercial time during separate casting (11 a.m.–4 p.m.) amounted to 2 minutes per hour or even less.

C. *Ascertainment of Needs*—

133. The management of the stations made a continuing effort to keep abreast of the problems, needs and interests of their service area. This was in part accomplished as a byproduct of the stations' local news coverage (Western Ex. 7, pp. 226–227). In addition, stations' management remained in touch with community leaders as a result of the stations' live coverage of community events of special importance. Finally, many of the stations' programs were the result of joint cooperation between the management and members of the community, and the continuing relationship in connection with these programs also provided an opportunity for the exchange of views and opinions (Western Ex. 7, p. 97).

134. In 1968, WSTC organized the Stamford Radio Council whose purpose was "to advise WSTC on the community needs of its coverage area, Greenwich, Stamford, Darien, and New Canaan." (Western Ex. 7, p. 97–98.) In 1968, the Council consisted of twenty-two area leaders, and a dinner meeting attended by 18 of those leaders was held on July 19, 1968 (Bur. Ex. 13). In 1969, the Council consisted of 25 leaders, and a dinner meeting attended by 19 of those leaders was held on June 25, 1969 (Western Ex. 7, pp. 98, 109). At these meetings, members

[39] The FM station devoted about 60% more time for PSA's than did the AM station.
[40] Six stations reported in excess of 400 PSA's and 2 of these carried an amazing 696 and 617 PSA's, respectively, in the most recent composite week shown in their renewal applications.
[41] See tabulation in Par. 94 of Bureau's proposed findings.

of WSTC management described the stations' operations and explained in detail the purpose of the meeting.[42] Members of the Council were then asked to offer their comments on community problems, needs and interests, and suggest ways the stations could help meet them (Bur. Ex. 13; Western Ex. 7, p. 92). Notes of the meetings and of the comments and suggestions received were made and kept for future use. Most of the comments in the 1968 meeting reported by WSTC were directed toward programming improvements; a few identified community problems (Bur. Ex. 12, pp. 2–3).

135. Members of the station's management were active in many local community activities and organizations. By this active participation the stations were kept informed on the needs and interests of the communities served (Bur. Ex. 13, pp. 3–4). In its most recent renewal application filed before the hearing, Western recited the comments from the Radio Council elicited at the 1968 meeting. Western then stated that it could best serve the needs and interests of the public by "complete local area news coverage of the deliberation of government and civic officials and boards and all public events", by "factual and unbiased State, National and International news", and by "programs that include the minorities and panel discussions to air vital issues and to provide the public with all sides of every issue." (Bur. Ex. 13, p. 5.)

D. *Local Programing*—

136. Western Connecticut submitted evidence regarding the stations' local programming in four major areas: regular "public affairs" programs; regular non-entertainment programs; live coverage of community events; and entertainment and sports programs of particular interest to the community.[43]

137. In order to provide the Stamford community with firsthand information of governmental activities, WSTC provided regular live coverage of the meetings of local governmental bodies, including:[44]

A. *"Board of Education Meetings."*—For at least ten years, WSTC has carried live one of the two monthly meetings of the Stamford Board of Education.

B. *"Board of Representatives Meetings."*—WSTC carried live (and generally to their conclusion) the monthly meetings of the Stamford Board of Representatives. Additionally, the stations broadcast special Board meetings on issues of particular public importance (Western Ex. 7, pp. 99–100).

138. WSTC also broadcast other regular local "public affairs" programs, a number of them produced in cooperation with local governmental or community social or cultural organizations.[45] For the most part, these programs were broadcast between 7 and 8 p.m. on weekday evenings. They included the following programs (Western Ex. 7, pp. 100–104):

A. *"Mayor's Report."*—This was a bi-monthly program on which the mayor of Stamford and members of his administration reported to Stamford citizens on recent governmental activities.

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[42] At the 1968 meeting, a taped recording reviewing the highlights of the current public service programs was presented (Bur. Ex. 13, p. 2).

[43] The local programming herein described was carried on the stations up to and including October 8, 1970, the date of the Show Cause Order (Tr. 761).

[44] Community leaders whose affidavits were submitted by Western Connecticut, see *infra*, specifically mentioned WSTC's coverage of meetings of governmental bodies (Western Ex. 7, pp. 137; 141; 146; 153–54; 167; and 179).

[45] Several community leaders specifically mentioned the stations' efforts in developing such programs (Western Ex. 7, pp. 111 ["Black Viewpoint"]; 123, 139 ["Washington Report"]; 154 ["Black Viewpoint"]; and 167 ["Know Your Schools"]).

B. "*Urban Redevelopment Commission Reports.*"—WSTC management initiated this program in 1960 in light of the importance to Stamford citizens of the urban renewal projects administered by the Stamford Urban Redevelopment Commission. On the bi-monthly program, the chairman and members of the Commission reported on its activities.

C. "*Let It Be Heard.*"—This was a program produced in cooperation with the Stamford Human Rights Commission on which members of the Commission and guests discussed problems and issues relating to human and civic rights.

D. "*Report from Washington.*"—This was a bi-monthly program on which U.S. Congressmen and Senators from Stamford and surrounding communities reported to their constituents.

E. "*C.T.E. News and Views.*"—This program was initiated in 1968 through mutual agreement and planning between the stations and the Committee on Training and Employment (C.T.E.), Stamford's anti-poverty agency. The bi-monthly program included reports on C.T.E.'s activities and interviews with guests.

F. "*Black Viewpoint.*"—This program grew out of a suggestion made by representatives of the West Main Street Community Center. Produced in cooperation with members of the community center, the bi-monthly program featured representatives from the center, local minority group residents, and guests discussing issues of particular interest to blacks.

G. "*High School Report.*"—This program was presented throughout the school year, and provided an outlet for local student expression. Programs were prepared by students from Stamford's high schools on a rotating basis. Students were responsible for choice of topics, and the program presented discussions and interviews on issues of current interest to the students.

H. "*Community Affairs.*"—On this program, selected issues of particular local or national importance were discussed in depth by panels of local or national experts. The range of topics discussed on "Community Affairs" since January 1, 1968, and until October 8, 1970, included alcoholism and drugs; civic affairs; urban renewal; United Fund; communications media; cultural affairs; education; finances and taxes; foreign affairs; natural resources and conservation; politics; science; social services and housing (Western Ex. 7, pp. 103, 209–19).

I. "*Stamford Forum for World Affairs.*"—WSTC broadcast approximately six to eight of the regular meetings of the Stamford Forum for World Affairs, an organization formed in 1946 to provide area residents with the opportunity to hear prominent national and international speakers discuss topics of current interest in the area of foreign affairs.

J. "*Source Library Program.*"—In cooperation with the Source Library in Darien, Connecticut, WSTC broadcast this series of programs of panel discussions and debates on a broad range of controversial issues.

139. WSTC presented a schedule of locally-produced, non-entertainment non-sports programming. These programs are described below (Western Ex. 7, pp. 104–106):

A. "*Point of View*" (3 times weekly).—This program, hostessed by a local resident, featured live or taped interviews with local and national personalities on a wide variety of topics. Once a year, a series of interviews was done abroad. The interviewees represented a wide cross-section of interests (Western Ex. 7, pp. 221–22).

B. "*Anita Show*" (2 times weekly).—This interview program, which began approximately four years ago, was hostessed by a local woman, who interviewed local people with a particular focus on culture and the arts.

C. "*Making the Most of Maturity*" (weekly).—This program, hostessed by another local woman, featured speakers and discussions on topics of particular interest to the elderly. A series of programs would on occasion be devoted to exploring various aspects of a selected topic (Western Ex. 7, pp. 105–106).[46]

D. "*Worship Services.*"—In cooperation with the Stamford Council of Churches and Synagogues, WSTC broadcast live each Sunday a worship service from an area church. Churches were rotated on a monthly basis.

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[46] Walter I. Hotz, Administrator of Courtland Gardens, specifically praised WSTC's programming efforts on behalf of the elderly (Western Ex. 7, p. 177).

E. "*Reverend, Priest and Rabbi.*"—On this weekly program local clergy from three faiths and their guests discussed topics of current religious interest.[47]

140. WSTC also provided live or tape-delayed coverage of local events of interest to the community.

The following were special local events covered by WSTC on a regular basis (Western Ex. 7, pp. 100–105):[48]

A. "*Zoning Board Hearings.*"—WSTC provided live coverage of the hearings of the zoning board on particularly controversial matters. For example, in 1968, much debate revolved around the issues of scattered sites, and the station carried the board's hearings on the subject.

B. "*Election Returns.*"—All primary and general election returns were broadcast live from the Stamford Registrar's office. Further, the station carried candidates' election night acceptance and concession speeches.

C. "*Service Club Meetings.*"—WSTC broadcast (live or tape) the luncheon meetings of the Kiwanis, Exchange, Rotary, and Lions clubs when they presented speakers of particular interest to the community. The station also broadcast Chamber of Commerce meetings. The meetings of other local groups—such as the Stamford Citizens for Conservation; the Management Council of Southwestern Connecticut; Jobs, Inc.; the Stamford Community Council; and the Tuberculosis and Respiratory Disease Association—were likewise broadcast when they presented speakers of particular importance. Additionally, the stations provided coverage of special meetings or dinners of local service organizations. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, 29 of the programs broadcast were meetings of local service clubs or organizations; of the 55 examples of 1970 local events, 22 of the programs broadcast were meetings of local service clubs or organizations (Western Ex. 7, pp. 182–207).

D. "*Voice of Democracy Contest.*"—WSTC worked with the Veterans of Foreign Wars in sponsoring and broadcasting the local "Voice of Democracy" contest. Students from area high schools submitted and read an essay on a selected topic. Finalists were invited to WSTC studios, where they read their essays over the air and where the judges picked the Stamford winner.

E. "*Graduation Exercises*".—WSTC carried live the graduation exercises of local high schools, including Stamford, Rippowam, Stamford Catholic, New Canaan, Darien and Greenwich High Schools, and the King's School and Sacred Heart Academy.

F. "*Pink Tent*".—Pink Tent is a summer festival of the arts in Stamford. WSTC has carried live many of the festival's programs each summer since its inception in 1968.

141. In addition to the above-described coverage of regularly-occurring local events, such as ground-breakings, local parades, opening ceremonies, and community Fourth of July, Law Day, Memorial Day and Columbus Day celebrations. Special governmental events were also covered—such as the Mayor's budget report; inauguration ceremonies; the annual report of the head of the Board of Education; and the Board of Representatives' special meeting on Charter Revision. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, 38 of the programs broadcast were broadcasts of special local events; of the 55 examples of 1970 coverage, 17 were broadcasts of special local events (Western Ex. 7, pp. 182–207).

142. The stations also broadcast local services in honor of particular religious holidays, such as Easter, Christmas, the Jewish High Holy Days. Of the examples of the stations' coverage of local community

[47] Two community leaders mentioned the stations' broadcasts of religious services and of the program "Reverend, Priest and Rabbi" (Western Ex. 7, pp. 131–132).

[48] Several of the community leaders whose affidavits were submitted by Western Connecticut mentioned the stations' coverage of local community events (Western Ex. 7, pp. 130; 132; 141; 143; 149 and 165).

events, 12 of the programs broadcast in 1969 were special religious services, and six of the programs broadcast in 1970 were special religious services (Western Ex. 7, pp. 182–207).

143. The stations also broadcast the concerts of local performing arts societies, such as the Men's Ensemble, the Young Philharmonic Society, the Stamford Glee Club, and the Schubert Club. Concerts from the three local high schools were also broadcast. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, nineteen were broadcasts of local concerts; of the 55 examples of 1970 coverage, eight were broadcasts of local concerts.

144. The stations also broadcast the following locally-oriented entertainment and sports programs (Western Ex. 7, pp. 106–107):

A. "*Alice Edwards Johnson*".—This was a program of gospel music and information of particular interest to the area black community. It was hostessed by a local black resident, and was broadcast Saturday evenings from 8:05 to 9:00 p.m.

B. "*Here, There and Everywhere*" [49].—In 1969, WSTC worked with Dr. Peter Goldmark of CBS in developing the program, which was run entirely by local high school students. It featured music oriented to the younger set, as well as occasional discussions on problems and issues of particular interest to young people. The program was broadcast daily from 3:00 to 4:00 p.m.[50]

C. "*Italian, Polish and Irish Hours*".—These programs presented music and news of particular interest to ethnic groups within WSTC's service area. Each was hosted by a local man. In addition to music, the programs presented announcements of community activities of particular interest to local ethnic groups. They were carried on weekend afternoons.

D. "*Local Sports*".—WSTC carried the championship games of the Babe Ruth and Little Leagues. WSTC also carried Pop Warner football and provided live coverage of the football games of the three local high schools.

E. *News.*

145. In its news programming, WSTC combined locally-produced and network news to produce its news reports throughout the day. Approximately 43% of the news broadcast is locally produced, the remaining 57% coming from ABC network and other sources. In addition to its daily news presentations, the WSTC news staff compiles news on special subjects or events of interest to the community (WSTC Ex. 7, pp. 226–227).

F. *Community Services.*

146. The stations provided local residents with notifications of all school closings due to weather; notifications of industry working schedule changes; notifications of changes in schedules of divisions of municipal government; reports on road conditions based on reports from local authorities and state police; notifications regarding commuter train delays; information regarding the contents of school lunch menus; and notifications regarding all power and telephone service failures,[51] weather reports, and beach and boating reports. The station also helped to promote the activities of local organizations,[52] and local community events.

[49] Discontinued after release of the Show Cause Order.

[50] Three of the community leaders whose affidavits were submitted by Western Connecticut specifically mentioned the stations' efforts in developing this program (Western Ex. 7, pp. 111, 171 and 174).

[51] Several community leaders whose affidavits were submitted by Western Connecticut specifically noted WSTC's community service in this regard (Western Ex. 7, pp. 116, 122, 123, 140 and 167).

[52] Several community leaders whose affidavits were submitted by Western Connecticut specifically praised the stations' efforts in promoting the cause of local charitable and civic organizations (Western Ex. 7, pp. 123, 124, 126, 147, 166 and 169).

G. *Community Evaluation.*

147. Western submitted the verified affidavits of forty-four Stamford area community leaders (Western Ex. 7, pp. 111–180),[53] which were admitted with reference to particular programs or aspects of community service as evidence of the meritorius nature of the stations' programming (Tr. 754; 756–759). These statements were directed to various facets of WSTC's program services. They are dated in the six week period immediately prior to the commencement of the hearing; therefore it is a fair inference that the statements were solicited by the licensee for presentation at the hearing although there is no evidence that the specific comments did not originate from the authors. Specific areas praised by these community leaders included the stations' live or tape-delayed coverage of meetings of local governmental bodies;[54] programs developed by the stations in cooperation with local governmental, cultural or charitable organizations;[55] the stations' programming efforts on behalf of minority groups;[56] the stations' coverage of local community events;[57] the stations' sports programming;[58] and the stations' news coverage, particularly of local events.[59] Three community leaders specifically mentioned WSTC's role in developing the program "Here, There and Everywhere."[60] Several community leaders particularly noted the stations' contribution in providing the community services discussed *supra*.[61] Finally, a number of community leaders praised the stations' efforts in utilizing its program services in promoting the causes of enumerated local community and charitable organizations.[62]

H. *Awards.*

148. Western submitted thirteen unsolicited award certificates received by the stations from various civic and charitable organizations for their public service contributions (Western Ex. 7, pp. 232–244). These awards were presented by: The Department of the Treasury for support of the savings bonds program; National Federation of Music Clubs in connection with the 1971 Parade of American Music; Committee on Training and Employment, Inc. of Stamford (1970); Radio Free Europe for 1970 campaign; Girl Scout Council, Inc. (1970); U.S. Department of Interior for services in improving the environment; American Association of Retired Persons for the Year 1969; Stamford Jaycees (1969); Save the Children Federation (1971); 1968 Christmas Seal Campaign; Campaign against Respiratory Diseases; Stamford Health Department—an award to the "Here, There, and Everywhere" program in connection with Cleaner Air Week; and Stamford Jaycees (1967).

149. Additional certificates of award received by the station for its public service efforts included the following: for United States Air Force recruiting program (1968); Kiwanis International "In Ap-

[53] An unverified letter from the broadcast media director of the New York Mets baseball team was also submitted (Western Ex. 7, p. 115).
[54] Western Ex. 7, pp. 141, 146, 153–54, 167 and 169.
[55] Western Ex. 7, pp. 111, 123, 139, 154 and 167.
[56] Western Ex. 7, pp. 111, 120 and 154.
[57] Western Ex. 7, pp. 130, 133, 141, 143, 149 and 165.
[58] Western Ex. 7, pp. 115 and 143.
[59] Western Ex. 7, pp. 111, 124, 128, 153 and 160.
[60] Western Ex. 7, pp. 111, 171 and 174.
[61] Western Ex. 7, pp. 116, 122–23, and 167–68.
[62] Western Ex. 7, 123, 125–26, 128, 149, 166 and 169.

preciation for Outstanding Service"; American Cancer Society "In Acknowledgment of Outstanding Service"; United Cerebral Palsy Telethon (1966); and State of Connecticut Constitutional Convention to Station WSTC–FM (1965).

CONCLUSIONS

Stations WSTC–AM and FM and Stamford Advocate

1. Stamford, Connecticut, which has a population of about 109,000 is situated in the southeastern part of the state, about 35 miles from New York City. Western Connecticut Broadcasting Company (Western), is the licensee of Stamford's only local broadcast stations—WSTC and WSTC–FM. These stations also serve the Connecticut towns of Greenwich, Darien, and New Canaan, whose combined population is about 98,000. Mr. Kingsley Gillespie, the President, Treasurer and a Director of Western, owns 51.6% of its stock. The Gillespie family owns Stamford's only local daily newspaper—the *Stamford Advocate*. Mr. Gillespie, the President, Treasurer and a Director of the newspaper organization, is also the publisher of the *Advocate*, which has been controlled by the Gillespie family since 1867. The newspaper is Stamford's oldest business enterprise. The radio stations were acquired by Western in 1946 and 1947 (first the AM station, by purchase, and then the FM station by original application). Prior to this proceeding the stations have regularly received license renewals and, except for technical violations discovered in routine inspections, they have never been charged with violation of any Commission statute or rule.

THE CENSORSHIP ISSUE

2. Section 315(a) of the Communications Act of 1934, as amended, provides, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section.* . . . (Italic supplied)

Section 73.120(b) of the Commission's Rules, applicable to AM stations and Section 73.290(b), applicable to FM stations, incorporate the foregoing provisions of Section 315(a).

3. The Commission's Public Notice of April 27, 1966 entitled "Use of Broadcast Facilities by Candidates For Public Office"[63] (31 F.R. 6660), contained interpretations applying the prohibitions of Section 315(a) and the parallel regulations to various situations. Among other things, the 1966 Primer (Part VII), indicated that it would not be permissible for a station to delete material in a political broadcast because it believes such matter is or may be libelous. The Commission stated in this connection (Q. and A. 1): "Any such action would entail censorship which is expressly prohibited by section 315 of the

[63] Hereinafter referred to as the "1966 Primer".

Communications Act." Moreover, the Commission in the 1966 Primer (Part VII, Q. and A. 7) noted that "any requirement of an advance script from a candidate violates 315." [64]

4. In the Fall of 1969, Stamford elected a Mayor. Preceding the general election, the Democrats selected their candidate in a primary election contest that saw Paul Kuczo, Jr. defeat the incumbent Mayor, Bruno Giordano. The Republicans did not have a primary contest but nominated a candidate. Mr. Kuczo then faced his Republican opponent, Julius Wilensky, and an Independent candidate, John Nocerino, who called his party the Fusion Party. All of these candidates used the WSTC stations in their campaigns by purchasing time for paid political announcements. Julian Schwartz, who was the general manager of WSTC from 1947 to November, 1970, personally handled the sale of time for political broadcasts during the 1969 primary and general mayoral elections. During 1969 Schwartz was also secretary and a director of Western.

5. The findings of fact reflect that during the 1969 Stamford mayoral campaign, both in the primary and general election phases, Station WSTC repeatedly violated the censorship prohibition of Section 315(a) and of the corresponding provisions in Sections 73.120(b) and 73.290(b) of Commission regulations. The censorship took two forms. First, Schwartz required all three candidates in the primary election to submit their scripts to him in advance of broadcast for his review of their content. Also, in the general election Schwartz required Democratic candidate Kuczo and Fusion candidate Nocerino to present their scripts to him for review of their material before they appeared on the air. Both candidates were instructed to arrive at the WSTC studio in advance of their broadcast or taping sessions. If Schwartz was there, he reviewed the candidate's script. If Schwartz was away from the studio, the candidate read the script to him over the telephone.[65]

6. The Republican candidate for Mayor, Julius Wilensky, appeared personally at WSTC's studio at least four times to participate in recording tapes to be broadcast as political announcements. At the studio Mr. Wilensky enjoyed the professional assistance of John Martin, a WSTC announcer, who had been employed by the Republican Town Committee to do their spots outside of his working hours with the station. On those occasions when Mr. Wilensky made tapes at WSTC's studio he was invariably either greeted or bade good-bye by WSTC's manager, Julian Schwartz. Schwartz, however, despite such unequivocal testimony by an employee of the station, consistently denied that Wilensky appeared personally in paid political announcements. Neither Mr. Schwartz nor Mr. Martin reviewed Mr. Wilensky's scripts before they were taped or broadcast. Whatever was on the script was taped, and whatever was taped was broadcast.

7. According to Schwartz, the purpose of his reviewing political scripts was to make certain that the text could be delivered within the time purchased and to insure that the material was "in good taste".

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[64] The Commission indicated the following exception to the prohibition against requiring an advance script: "The licensee may request submission of an advance script, to aid in its presentation of the program (e.g., suggestions as to the amount of time needed to deliver the script."

[65] Kuczo's opponent in the Democratic primary was only reviewed when he taped his announcements at the WSTC studio. When he taped his scripts elsewhere, his material was not reviewed.

He testified too that his motive was to protect the reputation of the station and to assist the candidates. Schwartz considered material not in good taste if it involved name-calling or a person's reputation, an exaggeration or seemed otherwise objectionable. Kingsley Gillespie was aware of Schwartz's policy of requiring candidates to submit scripts for review in advance of broadcast. Although Gillespie was not happy over the policy, he subscribed to it because, as he expressed it, he could think of no better solution to the problem of preserving the image of the station for good taste. One of the purposes of reviewing the scripts, Gillespie testified, "was to keep from destroying the image of the station that we had spent so many years building up." Regardless of the concern of Gillespie and Schwartz over "good taste" and in preserving the WSTC image, under the terms of the Commission's 1966 Primer, any requirement for candidates' advance submission of scripts for substantive review is forbidden by Section 315(a). In this respect, therefore, it is clear that Western, with the knowledge of its president and principal stockholder, pursued a policy which constituted censorship under Commission guidelines.

8. Both Gillespie and Schwartz testified they were unaware that such a policy violated the Act, and the Examiner credits this testimony. Prior to issuance of its 1966 Primer, the Commission itself subscribed to the view that a requirement of advance submission of scripts was consistent with Section 315(a); see *H. A. I. Rosenberg*, 11 RR 236, 237 (1958); *D. L. Grace*, 40 F.C.C. 297, 298 (1958). Thus the understanding of Gillespie and Schwartz agreed with the above-cited Commission letters of interpretation regarding Section 315(a) although there is no evidence as to whether either interpretative letter was read by Gillespie or Schwartz. The Commission's 1966 Primer (Question 7), expressed a change in interpretation since it stated that except for the purpose of timing, "any requirement of an advance script violates Section 315." Schwartz testified that he had read the Question 7 material (quoted in Paragraph 16 of findings above) "prior to" the 1969 campaign (Tr. 244). But the record is not clear as to just how long before that campaign he had seen this material. Schwartz's testimony does establish that sometime in 1968 he had read a portion of a document published by the National Association of Broadcasters in the same year which led him to believe his policy was not in violation of Section 315 (Para. 15 of findings, *supra*). The document entitled "Political Broadcast Catechism and Fairness Doctrine" implied in Question and Answer 67 that scripts could be reviewed and expressly stated that a licensee should attempt to persuade a candidate to delete obscene or defamatory passages from his material.[66] Schwartz construed the Question 67 portion of the Catechism as stating a licensee could request candidates to submit their scripts for review (Tr. 279). It was reasonable, in light of the National Association of Broadcasters' interpretation of Section 315(a) considered above, for Schwartz as a layman to believe that his policy of requiring advance scripts was proper. The licensee did not have communications counsel to advise it that the earlier Commission interpretation published in the 1966 Primer had not been changed, despite any implication in the 1968 NAB publication to the contrary.

[66] Question 67 and answer thereto is set forth in Paragraph 15 of the findings, *supra*.

9. From whence Gillespie derived his belief that the policy of requiring advance scripts for review was legal under the Communications Act does not appear from the record. He testified that he told Schwartz in the late 40's that the latter had a right to review political scripts and suggest changes (see footnote, p. 20, *supra*). He also indicated that he kept himself informed "in a general way" on Commission regulations but placed "complete reliance" on Schwartz, the general manager, in this area (Tr. 686–687). However, as the president and majority stockholder of the licensee, Gillespie cannot insulate himself from responsibility for compliance with Section 315(a) by relying upon the general manager either for interpretation or implementation thereof. Obviously there is no requirement that a licensee of a broadcast station seek guidance from knowledgeable communications counsel in running its station. But the provisions of Section 315(a), among other parts of the Communications Act, require a degree of sophistication in their application that may not be possessed by even an experienced broadcaster. Thus, the wisdom of Western's construing and applying Section 315(a) without advice of communications counsel or inquiry to the Commission is questionable. This is well illustrated in the present case by the fact that Gillespie was apparently unaware of the 1966 Primer interpretation of Section 315(a) which was contrary to his long held belief as to the right to require advance scripts. At the same time, one can sympathize with the unhappy plight of a broadcaster who, in reliance on an association release, arrived at an erroneous interpretation of the Act and Commission regulations. But, under the given circumstances, where an abrupt change from the Commission's previous explicit interpretation was ascertained from an implication in the 1968 NAB release, prudence dictated that some further inquiry be made by the licensee to make sure what the law was. The licensee's failure to do so resulted in serious, albeit not deliberate, violations of Section 315(a) of the Act in an especially significant area of public concern.

10. The basic purpose of the absolute prohibition against censorship in Section 315(a) is to assure candidates of the opportunity to use broadcast facilities unfettered by licensee judgments as to the manner of use. *Farmers Union* v. *WDAY*, 360 U.S. 527, 529. Thus, as the Supreme Court has pointed out, Congress intended to use the term "censorship" in Section 315 in its "commonly understood meaning" which "connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material" (*Ibid.* at p. 527). The findings of fact reflect a second way in which the licensee repeatedly violated the censorship provision of Section 315(a) during the 1969 election campaign was by reviewing some of Mayor Giordano's scripts in the primary campaign (par. 31 of Findings), by reviewing Fusion candidate John Nocerino's scripts (three or four), in September 1969 (par. 33 of Findings), by reviewing Democratic candidate Kuczo's scripts on six occasions during the general election campaign (par. 25 of Findings), and by reviewing at least five of Nocerino's scripts during the general election campaign (pars. 34–39 of Findings).

11. The review of political scripts at WSTC was performed by the general manager, Mr. Schwartz. The president of the licensee, Mr.

Gillespie, knew that Schwartz was reviewing candidates' scripts during the 1969 primary and general election campaigns in Stamford. Gillespie was not present at nor did he participate in, the actual reviewing. The activities of Schwartz in scrutinizing scripts produced changes in their content made at his suggestion and, beyond that, deletions made by him personally ranging from phrases to sentences usually and even an entire paragraph on occasion. It was Gillespie's belief that under Section 315(a), candidates could be persuaded to make changes in their scripts but could not be compelled to do so. Schwartz was of the same view, so he professed.

12. Schwartz suggested changes in Mayor Giordano's scripts during the 1969 primary, finding portions of them to be "too strong". While the candidate disagreed at times, he always yielded and accepted Schwartz's suggestions, apprehending there would be "repercussions" if he failed to go along. Schwartz, as noted above, also reviewed the Kuczo and Nocerino scripts. Using pen or pencil, Schwartz applied his own standard of "good taste". Schwartz personally crossed out or insisted the candidates cross out those segments of their scripts which he found to be objectionable. At times arguments ensued during which the candidates sought to preserve the integrity of their scripts. On one occasion, a candidate angrily declared that Schwartz has "a hell of a nerve" because there was nothing wrong with the crossed-out material. Schwartz, however, was not interested in debates. The material comes out—or you do not go on, he told Kuczo and Nocerino on separate occasions. In forcing the deletion of material against the candidates' wishes and in intimidating candidates from protesting changes by having previously threatened to keep them off the air when they had voiced objections, Schwartz exceeded the limits of his avowed understanding that candidates could at most be induced to make changes in their scripts by persuasion, and in no event by compulsion.

13. The findings detailed above demonstrate that, in his role as a self-appointed censor, Schwartz was arbitrary. Schwartz took exception to the type of material that one might encounter in any campaign: that an opposing candidate's statements must be taken with a grain of salt; that the opposition had a poor labor record; that an opposing candidate spent $70,000 to change his image (Schwartz thought this sum was an exaggeration); that an opposing candidate would support big business; that an opposing candidate had lost his "cool"; and that an opponent had accomplished little during his long public life. Schwarz deleted an entire paragraph from a script because he believed the contents were untrue. Other deletions he made because the crossed-out material was "in bad taste", was "unnecessary", was "in poor taste", or constituted "personal attacks". The reasons stated by Schwartz for his deletions were highly subjective. Moreover, they afforded no justification for the blatant acts of censorship which were the end result of Schwartz's rationalizations.

14. Gillespie knew that insisting upon deletions and changes in scripts over candidates' objections was violative of Section 315(a). So far as appears from the record, he did not see any of the candidates' scripts either before or after Schwartz reviewed them. Nor did he know the deletions or changes made in scripts by Schwartz, whether without candidates' objections or despite them. However, Gillespie was in-

formed by Schwartz in the course of their almost daily meetings that the latter had some problems with some of the candidates and was taking care of them. Schwartz did not elaborate. Gillespie was also told by Schwartz, according to the latter's testimony, that Mr. Nocerino, the Fusion candidate, had objected to some of the changes made by Schwartz, with no further comment by the latter. Schwartz subsequently testified that, when asked by Gillespie how things were going with Nocerino, Schwartz had replied that he had made some changes in Nocerino's broadcasts. At this point Schwartz did not recall whether Gillespie had asked how Nocerino reacted to the changes although Schwartz stated that "he probably did". It is not evident from Schwartz's testimony or other evidence that Gillespie was told that the changes were made or retained after attempts to overcome the objections had proven ineffective or that Schwartz did not even attempt to persuade Nocerino to drop the objections.[67]

15. The findings reflect that at times Nocerino arrived at the WSTC studio after Schwartz had left and therefore Nocerino read the current script to Schwartz over the telephone. Based on Gillespie's testimony, it has been found that Schwartz complained to Gillespie that he could not "delete" any part of a script over the phone. Gillespie further testified that Schwartz informed him too that deletions or changes made were always persuasive (Tr. 87). While Gillespie's testimony indicates he was thus apprized that Schwartz was making deletions and other changes in scripts, it further reflects that he was also informed by Schwartz these changes were always effected with the agreement of the candidates.

16. It is obvious Gillespie's confidence in Schwartz was misplaced when he relied upon the latter's assurances that review of candidates' scripts was being kept within the bounds of persuasion. But as the chief executive officer of the licensee—one who played an active role in the operation of the WSTC stations—it was Gillespie's responsibility to prevent the coercive and dictatorial behavior of Schwartz in reviewing candidates' scripts during the 1969 mayoral campaign. There was an abdication of this responsibility on Gillespie's part in not taking measures to insure that the candidates would be afforded the opportunity of unhampered expression of their views and ideas. He made no effort to as certain the manner in which Schwartz was in fact reviewing the scripts. He at no time made it a point to be present at the station when Schwartz was in the process of discussing a script with a candidate. Although Gillespie was informed by Schwartz of "difficulties" with candidate Nocerino and of objections to some of the "changes" made, he did not invite Nocerino to discuss what had occurred and how this candidate could be satisfied in the future. Even after Nocerino complained on the air of illegal censorship by WSTC, Gillespie made no effort to contact Nocerino. Nor did Gillespie seek to learn at firsthand from other candidates whether they had complaints after Schwartz told him there were some problems with some of the candidates. He was content with Schwartz's cryptic assurance that the latter was taking care of these problems. Indeed, he did not seek to elicit from Schwartz the details of such problems or how Schwartz

[67] Pertinent testimony of Schwartz is quoted or discussed in Pars. 50–52 of the Findings.

was dealing with them. Gillespie's failure to pursue the several courses of action indicated above justifies the conclusion that he was not "tending the store" when it came to overseeing WSTC's treatment of all but one of the candidates in the 1969 Stamford mayoral election.

17. Nocerino telephoned the Stamford newspaper twice to complain to Gillespie first of deletions and then of a threat by Schwartz to keep him off the air if certain material was not deleted. Nocerino received no return call, although requested by him, after being told Gillespie was not in. Gillespie denied in his testimony that he was informed of the calls. There is no evidence to the contrary, and no showing that Nocerino spoke to Gilliespie's secretary who kept a record of phone calls in his absence, or even that the calls were made during regular office hours. While it may seem curious Gillespie was not informed of either call, the evidence does not merit the conclusion that he had ignored Nocerino's efforts to reach him.

18. Just as Gillespie failed to react responsibly to reports by Schwartz of dissatisfaction with review of scripts among the candidates during the 1969 election, so too he was complacent in the face of complaints of censorship by a candidate for public office in 1968 Stamford elections. Ralph Sheldon ran in the primaries, first for Judge of Probate and later for State Senate. Schwartz reviewed his scripts and required changes in them over Sheldon's objections. Schwartz went so far as to tell Sheldon that the material in his scripts had been presented to Gillespie and the stations' attorney for their approval—this was not true. Sheldon sought a meeting with Gillespie at which Schwartz also was present. Sheldon complained then of interference with the expression of his ideology and stated that he wanted more freedom of speech. Gillespie was not informed there had been deletions, nor was he shown the specific changes or any of Sheldon's scripts. His only response was to inform Sheldon that complaints had to be handled by Schwartz because the station was a separate organization from the newspaper. Once or twice Sheldon stopped at the door to Gillespie's office and complained that his political announcements and news releases were being censored. He met with the same response as before—tell it to Schwartz. While Gillespie did not take Sheldon's complaints seriously because of Sheldon's blithe antics such as engaging in gymnastic stunts and reciting poetry and his critical remarks in the role of a civic gadfly, as well as the "hit and run" nature of his visits, including making quick comments about censorship while standing in the office doorway, there was nevertheless substance in Sheldon's protests. In any event, despite the manifestations of Sheldon's entertaining and reformist personality noted in Gillespie's testimony, he was put on notice that Schwartz could be engaging in conduct in the handling of a candidate's material which required Gillespie's intervention and his close supervision of Schwartz in the political area. In sloughing off Sheldon's complaints of censorship in 1968, Gillespie's hands-off attitude was no deterrent to Schwartz's following the policy of censoring candidates' scripts as he personally saw fit in the 1969 mayoral election campaign.

EQUAL OPPORTUNITIES ISSUE

19. Section 315 of the Communications Act, the Commission's Rules (Sections 73.120(b) and 73.290(b)) as well as the "Primer" require licensees to afford all candidates with equal opportunities in the use of the broadcast facilities. Section 73.120(c)(2) provides:

> In making time available to candidates for public office no licensee shall make any discrimination between candidates *in* charges, *practices*, regulations, facilities, or *services* for or in connection with the service rendered pursuant to this part, *or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage;* nor shall any licensee make any contact or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office. (Italic supplied)

20. WSTC's treatment of Messrs. Wilensky, Kuczo and Nocerino (all of whom appeared personally in paid political announcements) was notably unequal. Perhaps the striking example of this lies in the fact that Wilensky was favored as the only candidate who was not subjected to illegal censorship. This is not to suggest that errant licensees should make a determined effort to censor *all* rather than some of the candidates.[68] But the fact remains that Wilensky was free to say whatever he wanted to say (which is the way it should be), whereas his two opponents were repeatedly subjected to stringent censorship. It is not a valid excuse for this discriminatory treatment that Schwartz had confidence that Wilensky would not indulge in announcements in poor taste.

21. Early in the 1969 campaign the Republicans purchased spots on WSTC for their paid political anouncements. The purchase included adjacencies to the popular local news program broadcast at 6:30 to 6:40 in the evening. In Stamford, adjacencies to the major local newscasts are favored by political candidates. In and of itself it was perfectly permissible for WSTC to accept the Republicans' reservation. The adjacency before this news program was reserved for commencement on September 29 to run until election day and the other adjacency was reserved for commencement on October 13 to run also until election day. Nocerino, the Fusion candidate, had asked Schwartz for, and had received, a five-minute spot on Monday evenings immediately preceding the 6:30 local news. After the primary election, Schwartz told Nocerino he had forgotten about the adjacency reservations by the Republicans and offered an adjacency prior to the 6:55 network world news or a spot at 7:05 or 7:35 p.m. Schwartz did not consider offering Nocerino a 6:24 spot because of Schwartz's policy of not broadcasting political announcements of competing candidates back-to-back. Under the station's practice such announcements were separated by a 10 to 15 minute minimum period. Nocerino, thus foreclosed from the adjacency to the 6:30 news, after objecting to the change in time, agreed to take, at Schwartz's suggestion as to the best alternative, the 6:55 p.m. slot.

22. The Commission has construed the Section 315 provision for affording candidates "equal opportunities" as including "the desir-

[68] Obviously, no censorship of *any* political candidate's speeches should ever be undertaken.

ability of the time segment allotted as well as its length." Primer, Question 1, 3 F.C.C. 2d 463, 491 (1966): "And while there is no requirement that a station afford candidate B exactly the same time of the day or exactly the same day of the week as candidate A, the time segments offered must be comparable as to desirability." (IBID.) The time arrangement which Nocerino had no choice but to accept resulted in preferential treatment for the Republican candidate for mayor. The general manager of WSTC knew that the 6:30–6:40 p.m. adjacencies were regarded by candidates as optimum slots. Yet he failed to accommodate Nocerino's request for the adjacency before 6:30 p.m. even for one evening a week. Nor did he offer Nocerino a closer time to the local evening news than 6:55 p.m. In view of the "equal opportunities" requirement of affording comparable time, he should have at least waived the WSTC minimum separation policy.

23. The minimum separation policy was in fact waived when Democratic candidate Kuczo placed an order for an additional spot before election day. It would have been appropriate to have waived sooner so that Nocerino could have had his program broadcast during a time period which was comparable to that being utilized by his Republican opponent. Because of the failure of WSTC to afford comparable time for Nocerino's broadcasts, it must again be concluded that the equal opportunities issue is to be resolved adversely to the licensee. In this connection, it should be noted that the licensee made no effort to ascertain from the Commission or counsel what its legal obligations were in the situation presented by Nocerino's request for the adjacency contracted to the Republicans. Moreover, careful consideration of the problem just on the basis of fair treatment to all candidates should have told WSTC management that the Republican candidate was being given a decided advantage over Nocerino—coincidently one that Section 310 does not tolerate. The violation was repeated with every broadcast by Nocerino, and it was willful in that it did not take place through inadvertence but through deliberate choice on Schwartz's part. Gillespie had no part in the violation—apparently Schwartz took it upon himself to decide the matter without even bringing it to Gillespie's attention.

24. Several spot announcements in which Wilensky personally appeared were made with the professional help of John Martin, a WSTC announcer. Mr. Martin's assistance was rendered outside the scope of his regular employment and was not identified by name in the announcements he taped with Wilensky. WSTC was paid for the use of its facilities when Martin and Wilensky taped the political spots at WSTC studios. Candidate Nocerino sought to purchase a five-minute spot to be broadcast within the "Italian Melodies" hour on Sunday, conducted by Vincent Martino, a school teacher. He proposed a question and answer format in Italian in which Martino would participate. Schwartz informed Nocerino Italian could not be used. Nocerino then proposed to do his program in English, with Martino and himself participating. After agreeing to this arrangement, Schwartz later repudiated it on the ground that Martino does not participate in political programs. The result was that Nocerino went on the air, was introduced by Martino, and asked and answered his own questions. Denial of Martino's participation in the English presentation in the

manner proposed by Nocerino was not discriminatory when compared with Martin's participation in Wilensky's spots. There was a clear distinction in the nature of the two types of presentation. The one involving Martin was a short spot whereas Nocerino's proposal would have required Martino to appear in a lengthier program format. Moreover, Martin was not identified on the Wilensky spots and they were not broadcast live whereas Nocerino proposed a live interlude in the "Italian Melodies" hour program and Martino, as the person who conducted it on Sundays, was identifiable merely by reason of his repeated participation therein.

25. The record reveals that at Schwartz's direction Martino broadcast a special edition of the "Italian Melodies" hour on the Sunday before election day, sponsored by a group calling themselves "Friends of Wilensky". Upon Schwartz's instructions, Martino announced the names of the sponsors in Italian and gave the names of the regions in Italy they came from in Italian. While only announcements conveying this information was involved, the use of Italian even to the limited extent mentioned above constituted discrimination against Nocerino who was refused the use of Italian either by Martino or himself on the question and answer program he had placed in the "Italian Melodies" hour. The special edition program involved discrimination against Nocerino in yet another way. It was logged as "political" and Martino's participation therein by announcing on his own program the sponsors and their places of origin in Italian amounted to his appearing on a political program which he was not permitted to do when Nocerino requested his services in connection with the same program. It must be concluded that the special broadcast of the "Italian Melodies" program in the manner described above involved wilfull failure to afford equal opportunities to all candidates for the office of mayor, in violation of Section 315(a) and the comparable regulations of the Commission.

MISREPRESENTATION OR LACK OF CANDOR

26. Schwartz was interviewed by Commission investigators in June, 1970. He gave them a statement (Western Ex. 1, pp. 8–10). He denied censoring Nocerino and Kuczo or deleting material from their announcements. Schwartz was again interviewed by Commission investigators in September, 1970, and furnished a statement (Western Ex. 1, pp. 11–12). He again denied censoring the two candidates although he had Nocerino's censored scripts before him. At that time he specifically denied that the deletions were made by him. But they were. Schwartz denied too that he threatened to bar Nocerino from going on the air if he did not remove objectionable material. The facts show otherwise. Schwartz did acknowledge in his statements that he required the mayoral candidates (except Wilensky), to submit their scripts for review and that he suggested changes be made to alter their material to conform to station policy. In his June, 1970 statement, Schwartz asserted that the names of Wilensky's supporters had been pronounced in Italian on the special Martino program without Schwartz's permission. This was untrue inasmuch as it has been found that Martino so pronounced the names at Schwartz's direction.

27. Finally, in a December, 1970 affidavit (Western Ex. 1, pp. 2–7), which was filed by WSTC as part of its Petition for Reconsideration, Schwartz acknowledged that he might have insisted upon deletions in Kuczo's and Nocerino's scripts and that he might have made deletions a condition to the use of WSTC's facilities. He stated that he did not remember either making or insisting upon deletions. He also indicated he was under tremendous emotional stress during the 1969 campaign because of labor problems at the station. At the hearing, however, Schwartz maintained that he did not require Kuczo or Nocerino to make any deletions—that all deletions in the scripts were made with the concurrence of the candidate. The findings show that deletions were forced upon the two candidates, contrary to Schwartz's claim.

28. In a December 4, 1970 affidavit submitted to the Commission Gillespie asserted he had been "shocked and distressed" to learn that during the 1969 campaign Schwartz was accused of requiring the deletion of material from the spots of Nocerino and Kuczo, "so much so that (he) found it difficult to accept." Gillespie noted that the stations never before had been accused of violation except for routine matters and that nothing of this sort had happened before during Schwartz's tenure (Western Ex. 2, pp. 3–4). Distressed Gillespie undoubtedly was, but was he really "shocked"? The word refers to a state of mind, a subjective reaction known only by Gillespie and ascertainable by others only from observation of his appearance and behavior, as well as from his comments at a particular time. Except for his own statement, there is no direct evidence as to how Gillespie reacted to learning that Schwartz had been charged with compelling deletions of material from political spots. It is true as Gillespie has pointed out, that no such allegation had been made against Schwartz or WSTC, either by the Commission or by candidates prior to 1969. While Gillespie knew that Schwartz was requiring the submission of scripts for review he did not witness or participate in the deletion of material nor was he shown deletions which had been made. Again, although Schwartz reported his inability to make deletions in Nocerino's material over the telephone, Gillespie was given to understand that all changes made at the station were made with the agreement of the candidates. Too, there is no cogent evidence that when Sheldon complained to Gillespie of censorship in 1968, he mentioned that "deletions" had been made by Schwartz over his objection. That Schwartz had engaged in the extreme practice of striking out material and forcing acceptance of the deletions which extended to entire paragraphs could well have been "shocking" to Gillespie. From the record there is no adequate basis for concluding to the contrary and hence it is not found that Gillespie misrepresented or was lacking in candor when he claimed to have been "shocked" upon learning of the accusation of Schwartz's requiring the deletion of material.

29. It is not amiss to point out, however, that if Gillespie had not delegated authority in Schwartz to review scripts, with no supervision or further inquiry when advised by Schwartz of candidates' objections and difficulties with them, there would have been no occasion to be shocked. At the hearing, Gillespie acknowledged that the review of scripts posed "the threat of censorship when you try to talk a man out

of poor taste". Yet he failed to institute procedures to preclude the incidence of censorship.

30. In an affidavit of September 28, 1971, submitted to the Commission by Gillespie, he stated that Sheldon had never complained to him of censorship by Schwartz prior to a visit to the newspaper office on September 16, 1971. As has been found, this statement by Gillespie was untrue. For, in a meeting held by appointment in Gillespie's office in 1968 and on some other occasions when passing by the office, Sheldon had complained of censorship by Schwartz. Denial of this by Gillespie was a misrepresentation. Since Gillespie was not inclined to pay serious attention to Sheldon's comments and shunted him off to Schwartz, this and attendant circumstances suggest that Gillespie in 1971 did not recall the incidents with Sheldon in 1968 and did not knowingly and wilfully misrepresent when he denied them.[69] That Gillespie or Schwartz made no record of the complaints is indicative of the cavalier manner in which they were treated by both men.

31. It has been found that Gillespie's affirmation, under oath, of the statement made in the Petition for Reconsideration that he was not aware of complaints until "long after the fact" was an inexcusable exaggeration. Even according to his own testimony at the hearing (Tr. 689), it was at most only two or three days later that Gillespie learned of a complaint of censorship made during a broadcast by Nocerino. Certainly he was not being truthful in making the statement in question, and while he may have had no ready recollection,[70] he was guilty of irresponsibility in not searching his memory carefully or checking with Schwartz before approving of this erroneous assertion.

32. As shown by the findings (Pars. 18 and 93), Schwartz, then 68 years of age, was in poor health and under unusual stress in the fall of 1969. His doctor testified that Schwartz had never before been affected by anxieties to the extent that they caused physical manifestations such as hives and hypertension. In the opinion of his doctor, Schwartz's physical and emotional condition could have affected his judgment and in fact caused him to be irritable and upset. Judge Maurice Buckley, who handled labor negotiations for the station beginning in October, 1969, testified that Schwartz, who was assisting him, appeared high strung and became easily aggravated. Even the testimony of the candidates indicates that a change came over Schwartz as the campaign progressed in that the scope of his objections to material broadened.

33. Though recognizing the existence of Schwartz's physical and emotional problems, his doctor's testimony concerning them, and the intensification of his censorship activities, do not warrant the conclusion that Schwartz was acting out of character in 1969 because he was under stress. First, the record does not suggest that the performance of his managerial duties in other areas than the political one was aberrational. Further, he was reporting to Gillespie on a daily basis, and at the hearing Gillespie made no claim that he found any reason to question whether Schwartz was behaving in a way to cause prob-

[69] Except for the meeting of about five minutes in duration, Sheldon voiced his complaints from the doorway of Gillespie's office when Gillespie, as publisher of the newspaper, was at his desk.

[70] At the hearing, he placed the time of Gillespie's report about Nocerino's complaint by estimating it with reference to election day. Schwartz testified he told Gillespie the day following the event.

lems at the station. Indeed, there is no indication from the record that Gillespie detected anything to cause him to visit the WSTC stations to check on what Schwartz was doing. Further, Schwartz was routinely reviewing all political scripts (except those of Wilensky), all during the 1969 primary and general elections, and this process began even before Schwartz was involved in labor negotiations which was a major source of anxiety. It was to be expected that the reviewing would be intensified when the election entered the more crucial stage after the primary campaign. Moreover, his thorough review of material in the general election was not consistent with any physical state that would adversely affect his behavior. That the changes made by Schwartz strikes one as quixotic is only a reflection of the fact that he was applying his own strict standards of good taste. The attempt to explain away Schwartz's actions in violation of Section 315(a) and pertinent regulations on the ground of personal problems must be rejected as unsupportable in light of the considerations noted above.

34. As noted above, in two statements and an affidavit furnished by Schwartz to the Commission between June and December of 1970, he made assertions about matters occurring in 1969 which, in light of evidence adduced at the hearing, have been found untrue. It has been found too that in his testimony in October of 1971, Schwartz also made statements about the same and other matters which were not credited by the Examiner. Six witnesses gave testimony contradicting Schwartz on various points and in every instance the Examiner has chosen to credit their testimony.[71] At the same time the Examiner has found Schwartz's testimony credible in several significant areas, such as, for example, that Schwartz informed Gillespie about Nocerino's on-the-air complaint the following morning whereas Gillespie testified he learned of it two or three days later; that Schwartz had read the 1968 National Association of Broadcasters publication which he interpreted as supporting his policy of reviewing scripts; and that he discontinued a paid political announcement in support of Wilensky which he found objectionable on the ground of name-calling.

35. Western contends that Schwartz did not deliberately make the misrepresentations in his prehearing statements to the Commission and that he did not prevaricate in giving untrue statements in the course of his testimony. To support this argument, Western asserts that "Schwartz is an elderly man who was affected by a severe combination of physical and emotional pressures during the period in question" which affected, among other things, his memory. Western adds that if Schwartz's recollection of events in the fall of 1969 was unclear, "it is attributable to these factors and the passage of time, not to any nefarious intent."

36. The Broadcast Bureau, on the other hand, contends that this is not a case of lack of memory by Schwartz but an intentional misstatement of the facts. Schwartz, the Bureau states, cast facts in a manner which would be most favorably construed for the licensee.[72] The Bureau further comments that Schwartz's own physician did not diagnose memory loss as a problem.

[71] In one instance, involving Nocerino's tardiness in arriving at the studio, the Examiner has preferred Gillespie's testimony on the ground of stronger recollection.

[72] As examples of calculated untruths the Bureau points out: that Schwartz "remembered" he reviewed Wilensky's scripts which in fact he did not do; and that after examining Nocerino's scripts Schwartz unequivocally stated the deletions were not his doing, but they were.

37. A choice between the opposing viewpoints outlined above on the question of whether Schwartz deliberately and knowingly falsified in his prehearing statements and his testimony must now be made. The resolution is not one easy to come by, for cogent arguments can be marshalled for the positions of both parties. Favoring the Bureau's contention is the compelling consideration that Schwartz's statements on a considerable number of important evidential issues were repeatedly proven untrue by the testimony of several other witnesses. Indeed the testimony of candidates for public office was delivered in such convincing fashion as to leave no room for doubt they were telling the truth and Schwartz's conflicting testimony could not be credited. The continual undermining of Schwartz's credibility through opposing testimony deemed reliable by the Examiner also brings to the fore the consideration that Schwartz had a very strong motive for falsifying—to preserve his unblemished record of a quarter of a century's service with WSTC.

38. Notwithstanding the adverse considerations discussed above, the Examiner has reached the conclusion that Schwartz did not engage in deliberate misrepresentation in his prehearing statements or in prevaricating in giving his testimony. The reasons which have influenced the Examiner to arrive at this determination are as follows. First, his demeanor at the hearing provided no clue that he was lying. Secondly, time and again his response to questions indicated that he had a poor recollection, or indeed, no recollection about many events albeit he did remember some. He did not recall the particulars of sessions with candidates. In this connection, his doctor testified that Schwartz in the latter part of 1969 was suffering from ailments attributable to anxiety and tension, and that stress affects the ability to concentrate so that events do not register on one's mind. It is noteworthy that except in his affidavit of December 4, 1970, when he acknowledged that he could have insisted upon deletions from scripts, he consistently denied requiring deletions. Contradictions in the testimony or statements of a witness are a good indication of lack of veracity in a witness, and, with the exception of certain statements of concession which were made by Schwartz in his affidavit even though he had no independent recollection that he made or insisted upon deletions, he evinced consistency in his denials thereof and in his testimony on other matters. The overwhelming impression created by Schwartz's testimony is that the misstatements made by him were the product of faulty recollection rather than intentional untruthfulness. This conclusion finds support in the sworn statements of community leaders indicating Schwartz's reputation for truthfulness, integrity and honesty is of a high order.

Maintenance of program logs—Issue (c)

39. Sections 73.112 and 73.282 of the Commission's Rules specify the manner in which AM and FM radio stations are to maintain program logs. Sections 73.112(a)(1)(iii) and 73.282(a)(1)(iii) provide that each program entered on the log is to be classified as to type. However, of the approximately 150 entries which appeared to record sponsored announcements for political candidates, approximately 142 did not include a notation to show the type of program as required by the Rules. Approximately 85 entries did not show the political affiliation of the candidate as required by Sections 73.112(a)(4)(ii) and 73.282

(a)(4)(ii). In addition, approximately 62 entries failed to list the candidate's name as required by the same sections. None of the entries included any notation, such as a check mark, to show that announcements concerning sponsorship were made, as required by Sections 73.112(a)(2)(iii) and 73.282(a)(2)(iii) of the Rules. The evidence suggests that sponsorship announcements were in fact made.

40. Obviously, the logging regulations cited above were each repeatedly violated and in wholesale fashion. Periodic review of the station's programming logs with an eye to checking compliance with the regulations in question would have disclosed the delinquencies. Mr. Schwartz, the general manager, placed the responsibility for such review upon the program director and the bookkeeping department and gave no specific instructions on log keeping. That others failed him is not an acceptable excuse for his own neglect to exercise minimum supervisory oversight. Corrective measures have been instituted to prevent a repetition of the violations of Commission's rules relating to program logs.

Maintenance of political file—Issue (d)

41. Sections 73.119(f) and 73.289(f) of the Commission's Rules require licensees to maintain for public inspection a list of the chief executives, officers or members of the executive committees which purchased time for political announcements and programs. It was stipulated that WSTC did not maintain such a list during the period from October 13, 1969 to June 19, 1970. Because of the duration of this type of violation over a long period, it is concluded that it was repeatedly committed. But since Schwartz thought a list was being kept its absence did not result from wilful disregard. Had Schwartz not been negligent in checking, however, the violations could not have happened. Their recurrence is now being prevented by the institution of the required measures.

MOTIVES OF SCHWARTZ

42. In its Order denying reconsideration (30 F.C.C. 2d 303, 304–305), the Commission indicated that inquiry would be appropriate into Schwartz's motives in his treatment of Kuczo and Nocerino. Principally, it desired clarification of incidents which led the Bureau to conclude that Schwartz's actions might have been part of a comprehensive scheme to favor one candidate over another. The Bureau, however, absolutely failed to establish the existence of any such scheme.

43. On the contrary, the reasonable conclusion to be drawn from the evidence is that Schwartz's motives in censoring were those he stated to the candidates and to the Commission. He simply wanted to ensure that all material broadcast over the stations conformed to his standards of good taste. The lack of intention to favor a particular candidate is evidenced by the fact that Schwartz objected to references in the Nocerino scripts which were uncomplimentary to both of the other candidates. He also took a Wilensky announcement attacking Kuczo off the air immediately after he learned of it. These actions are inconsistent with a view of Schwartz as a man with a fixed purpose to favor the Republican candidate. They are perfectly consistent, however, with a view of him as a man who was imbued with the desire to preserve good taste on his stations.

44. By refusing to accede to Nocerino's request to utilize an adjacency to the 6:30 p.m. local news for a five-minute spot while giving Wilensky the benefit of the adjacencies on both sides of the local news programs, Schwartz was failing to fulfill the obligation under Section 315 (a) to afford Nocerino an equal opportunity. But Schwartz's reason for doing so was to honor a prior contractual commitment to the Republicans. In failing to allocate time to Nocerino even before or after the Republican adjacencies, Schwartz was adhering to his policy of not allowing political announcements by candidates for the same public office back-to-back. Thus his unequal treatment of Nocerino with respect to the adjacency request is attributable to reasons other than calculated preferential treatment.

45. It is true that Schwartz did direct Mr. Martino, the host on the "Italian Melodies" special program to pronounce the names and places of origin of Wilensky's supporters in Italian when announcing a list of the persons sponsoring that program. Schwartz had refused Nocerino's request to have a program of questions and answers broadcast in Italian [73] during the "Italian Hour" or to have Nocerino participate even in an English version of his proposed program.[74] It has been concluded that the participation of Martino in the special program resulted in preferential treatment contrary to Section 315 of the Act. Yet it can be noted that Martino's participation in the special program was limited to the role of announcer and that no extensive use of Italian in comparison with the proposed Nocerino program was made in this connection. Moreover, Nocerino was permitted to buy time on the "Italian Hour" and Martino was announcer for his presentation. Thus the isolated example of willful violation during the special Italian hour is not so flagrant as to support the conclusion that Schwartz was motivated by favoritism toward a particular candidate in the 1969 election.

46. To bolster this conclusion, it can be added that Schwartz has never been active in politics, and the stations have never endorsed any political candidate. The newspaper did endorse Wilensky but no connection has been established between this endorsement and the way candidates were handled at the stations. In fact, the evidence points to the conclusion that except for Gillespie's oversight of both media the newspaper and the stations were operated independently of each other.

Meritorious programing issue

47. An issue added by the Review Board after release of the Commission's show cause order calls for a determination whether the programming of Stations WSTC–AM and FM have been "meritorious, particularly with regard to public service programs." [75] The Broadcast Bureau contends that aside from the substantial amount of time WSTC devotes to news, a "superior record" of service to the community has not been established. Western asserts that "meritorious" is by nature "both an absolute and a comparative concept." It then argues that, from the standpoint of evaluation on an absolute basis, WSTC has offered a "superior" program service to Stamford, particularly in the area of news and local expression. And, when rated on a comparative basis, adds Western, WSTC's performance places it "well in advance

[73] WSTC policy forbade a foreign language program.
[74] It was against station policy for a staff member to participate in a political broadcast.
[75] Review Board Memorandum Opinion and Order (FCC 70R–455), released December 30, 1970.

of other stations." Neither party has cited any Commission precedent which equates the term "meritorious" with "superior" performance. Moreover, viewed in the abstract, both "meritorious" and "superior" are nebulous words. However, the Examiner believes it is reasonable to regard both terms as denoting performance better than ordinary or above average to such an extent that it is praiseworthy.

48. Consideration of WSTC's programming in the non-entertainment categories for the composite weeks of 1969 and 1970 leads to the conclusion that on an overall basis it was meritorious. In both years its local news programs (locally produced newscasts) were presented during more than 12% of the total broadcast day. The total percentage of time devoted to both local and network news was over 30% in the 1969 composite week and about 28% in the 1970 composite week. These percentages in the news category demonstrate that WSTC's performance was outstanding in an area of broadcast service which is so vital for an informed citizenry. Indeed, WSTC ranked above forty-five other New England (including all of Connecticut) Class IV stations in a comparison of percentages of time utilized for news programming.

49. In 1969 composite week WSTC devoted about nine hours, or over 7% of total time, to public affairs programming and in the 1970 composite week it devoted about 5⅔ hours, or about 4⅛% of total time, to this very important category. The stations' locally-produced public affairs programming which was 4½ hours in 1969 remained at the same level in composite week 1970. A comparison with the 45 other Class IV stations in this category reflects a superior devotion to public affairs inasmuch as WSTC ranked seventh in amount of time and sixth in percentage of time in 1969 and thirteenth in both amount of time and percentage of time in 1970. But the laudable nature of WSTC's performance is even better shown by a recital of the specific programming of special significance in the local public affairs sector: monthly meetings, and special meetings on issues of particular importance, of the Stamford Board of Representatives were carried live; Board of Education meetings were broadcast live monthly; "Mayor's Report"—a bimonthly program in which the Mayor and members of his administration report on their recent activities was carried; "Black Viewpoint", presenting discussion of issues of particular interest to blacks, was carried bimonthly; "Community Affairs", involving a panel discussion in depth of selected important issues, local and national was presented; and "Source Library Program", a series of programs of panel discussions and debates on a broad range of controversial issues, was carried in cooperation with the Source Library in Darien. It is noteworthy too that during the 1969 composite week, WSTC broadcast eight locally-produced programs and a total of nineteen programs in the public affairs category. And in the 1970 composite week, WSTC carried ten such locally produced programs, with fifteen in all being broadcast. Certainly the large volume of public affairs programming in itself bespeaks WSTC's highly commendable attention to "public service programming."

50. In time devoted to "other" programming (religious, instructional, etc.), WSTC ranked among the highest third both in 1969 and 1970, based upon a comparison with the 45 other Class IV stations.

This was clearly above average performance on its part. The "other" programming encompassed a wide variety of programs of undoubted interest and benefit to WSTC listeners. In the 1969 composite week the stations carried 99 local community events and in the 1970 composite week, some 55 such events. Service club and Chamber of Commerce meetings of other local service groups were broadcast. All primary and general election returns were broadcast live, as were candidates' acceptance and concession speeches. Additional programs in the "other" programming category have been described in the findings (see pars. 139–143 of Findings). Together with the programs mentioned above, they point to the conclusion that WSTC's programming in the category under consideration evinced a zealous attention to the needs of the community and constituted meritorious performance by the stations.

51. The Examiner has attached no particular significance to the award certificates received by WSTC from various civic and charitable organizations laudatory or appreciative of public service programming. They were not received as the result of comparative evaluation of the particular programs mentioned and represent the usual acknowledgements of public service announcements and other programming which are routinely sent to cooperative stations. However, the forty-four affidavits of Stamford area community leaders apparently submitted to WSTC after solicitation have been given some weight. They praise the stations' initiative, cooperation, and other efforts in public service programming. The evident sincerity of the writers of these letters bolsters the Examiner's conclusions as to the meritorious performance of WSTC in the public affairs and "other" programming categories.

52. There is one aspect of WSTC's public service programming which requires critical discussion, namely, its record with regard to public service announcements (PSA's). For the 1969 composite week WSTC–AM carried 55 minutes and 20 seconds of PSA's. The number of PSA's carried during this total period was 160; this was substantially less than the number of PSA's carried by 33 of the 45 other Class IV stations with which WSTC was compared. In the 1969 composite week, WSTC carried only 32 minutes and 35 seconds of PSA's, and the total such announcements were 88, again substantially less than the number carried by all but five of the other Class IV stations in the comparison group. Western offered no explanation of the sharp decline in PSA's reflected by comparison of the 1969 and 1970 data. Certainly, based on the comparisons with other Class IV stations, WSTC's performance cannot be termed "meritorious". The WSTC–FM station in both composite years devoted about 60% more time and somewhat under 50% more time in the respective years to PSA's than its sister station. But this too was not outstanding service. However, there is no record of any complaint against WSTC for refusal to carry PSA's or for inadequacy of its PSA service.

53. A review of WSTC–AM's program logs for the 1969 and 1970 composite weeks has revealed that WSTC concentrated about 50% of the time devoted to PSA's in the weekend of the 1969 composite week and about 36% of its PSA time in the weekend of the 1970 composite week. Even more striking, about 22% of PSA time in the 1969 composite week was concentrated in the early Sunday morning period

between 6:00 a.m. and 10:00 a.m. Again, in the 1970 composite week, approximately 22% of PSA time was concentrated in the early Sunday morning period, with all but one minute having been broadcast between 6:00 a.m. and 7:00 a.m. of that day. The concentration practices of WSTC with regard to PSA's noted above were patently objectionable. The licensee made no attempt to justify them. Indeed, what valid reason could be advanced for scheduling about 20% of its weekly PSA time between 6:00 a.m. and 7:00 a.m. on a Sunday morning? Clearly, the volume, and scheduling of PSA's by WSTC as discussed above require the conclusion that in its presentation of PSA's the licensee was not providing a meritorious service. It may well be that the PSA scheduling practices engaged in by WSTC are not uncommon. If so, licensees engaging in similar practices might do well to bear in mind that meritorious PSA service is not demonstrated merely by pointing to the number of PSA's broadcast or to the total amount of time devoted to them. For undue concentration of PSA's can render their presentation ineffectual and thus indicative of inferior public service.

54. Despite the shortcomings in WSTC's PSA performance detailed above, its showing with respect to the other significant programming areas (news, public affairs and "other") has been sufficiently impressive to warrant the conclusion that overall the licensee has provided a meritorious service. Its broad programming in the field of public affairs reflects an unusual degree of dedication to the goal of a well informed electorate. WSTC's "other" programming in the nonentertainment field has been marked by close attention to the needs and interests of various community organizations: broadcast of meetings of local service clubs; broadcast of regularly occurring local events such as holiday and Law Day observances; local services for particular religious holidays (12 in 1969 and 6 in 1970); and graduation ceremonies of all high schools within the WSTC service area. It has provided a noteworthy service in the field of cultural entertainment by carrying live many of the programs presented in connection with the summer festival of arts in Stamford and a goodly number of concerts of the local performing arts societies (19 in 1969 and 8 in 1970). Other WSTC entertainment programs are equally notable: music and news of particular interest to different ethnic groups; and music and information of special interest to the local black community. Statements of community leaders submitted in the record commended WSTC for the stations' efforts in developing the following programs: "Black Viewpoint", "Washington Report" and "Know Your Schools". Other programs discussed in the findings further show WSTC's praiseworthy service to the Stamford community and area (pars. 138–140 of Findings).

SUMMATION

55. It has been concluded that Station WSTC (AM and FM) repeatedly violated the political censorship prohibition of Section 315 (a) of the Communications Act and corresponding provisions in Sections 73.120(b) and 73.290(b) of Commission regulations during the 1969 primary and general mayoral elections in Stamford. The manner of violation was two-fold. First, the general manager of the sta-

tions required all candidates in the primary election and all candidates except the Republican candidate in the general election to submit their scripts of political announcements for review of their contents prior to broadcast. This practice is forbidden by the Act and pertinent regulations. The president and controlling stockholder of the licensee of WSTC knew that the illegal policy was being applied by the general manager. Both men were of the belief that the review requirement was not improper; the general manager relied upon a 1968 publication of the National Association of Broadcasters which he so construed, and the president in turn relied upon the general manager. WSTC did not seek the advice of counsel in the communications field or direct inquiry to the Commission, to ascertain the legality of review of scripts.

56. The second form of repeated censorship violation was committed by the actual review of candidates' scripts of political announcements and programs during both the primary and general elections. The reviewing was performed by the general manager and the president of the stations knew this was being done although he was not present at, nor did he participate in, the reviewing process. It was the president's belief that it was proper under Section 315(a) to review scripts and to attempt to have changes made by persuasion only and never by compulsion. The general manager professed the same belief. But in fact the general manager on several occasions forced the deletion of material by threats to keep candidates off the air when they voiced objections. Moreover, the deletions and changes required by the general manager, although made for the avowed sake of "good-taste," were arbitrary since they reflected his own personal views of good taste. While it does not appear the president of WSTC was informed of the specific changes or told that they were made in the face of candidates' strong objections and even accompanied by threats of refusing use of the WSTC stations, he nevertheless abdicated his responsibility as chief executive officer in failing to take measures to prevent blatant censorship or even to make further inquiry when informed there had been "objections" by a candidate and that there were "difficulties" with this candidate. The president had previously sloughed off generalized complaints by a political candidate of censorship in 1968 against the general manager which were not taken seriously for reasons discussed above in Par. 18 of the Conclusions. Thus, he neglected to exercise the necessary close supervision of the station manager indicated by the 1968 complaints.

57. The conclusion has also been reached that WSTC, through the actions of its general manager, violated the equal opportunities requirement of Section 315 of the Act and Sections 73.120(b) and 73.290 (b) of the Rules during the 1969 general election by subjecting the Democratic and Fusion candidates for mayor to illegal censorship while giving the Republican candidate a free reign in delivering his political announcements. There was repeated violation of Section 315 of the regulations in this respect since the censorship was practiced upon several announcements of the other candidates. Moreover, the violation was wilful insofar as the general manager knew he was exceeding even his own understanding of permissible review by requiring deletions over objections of the protesting Democratic and Fusion candidates. The general manager of WSTC further illegally discrimi-

nated against the Fusion candidate during the 1969 election campaign by failing to make time available to him adjacent to, or near, the 6:30–6:40 p.m. popular local news program one evening a week while affording the Republican candidate the preferred adjacencies on both sides of the local news. This type of violation was repeatedly and wilfully committed during the campaign, as has been concluded above (see par. 23 of Conclusions). Finally, the general manager of WSTC wilfully violated the equal opportunities requirement by directing the host of a special "Italian Melodies" program to appear in a political program and pronounce the names and places of origin of the sponsors of a program promoting the candidacy of the Republican candidate while denying the request of the Fusion candidate to have the same host participate in a question and answer program in Italian within the "Italian Melodies" program. The president of WSTC, it has been concluded, was remiss in not exercising adequate control over the general manager so as to prevent the latter's discriminatory censorship even though the general manager's policy of review of candidates' script was known to him. However, the president had no knowledge of the other discriminatory actions.

58. Through the general manager's failure to supervise and review the maintenance of WSTC program logs and a list of purchasers of political time on WSTC, repeated violations of the logging requirements of Sections 73.112 and 73.282 of the Rules and of the political file requirements of Sections 73.119(f) and 73.289(f) of the Rules on a wholesale scale occurred during the 1969 general election. The president of WSTC apparently was not aware of these violations.

59. While it has been found that the general manager of WSTC both before and during the hearing made statements which were untrue, it has been concluded that he did not make deliberate misrepresentations in his prehearing statements or prevaricate in testifying. So too, it has been concluded that the president of WSTC did not knowingly and wilfully misrepresent or lack candor in making certain statements to the Commission before the hearing which have been found untrue. However, he made one misstatement before the hearing, which stemmed from irresponsibility and constituted careless exaggeration.

60. The question of whether the licenses of Stations WSTC–AM and FM should be revoked in view of the extensive violations of Section 315(a) and the various regulations pertaining to censorship, equal opportunities, logging and political listing found in this proceeding is not easy to resolve. Obviously political censorship and unequal treatment of competing candidates for an important public office cannot be taken lightly. In this case, they prevented all but one of the Stamford mayoral candidates in 1969 from having unhampered access to the ears of voters and resulted in preferential treatment in this and other ways among the candidates. The consequences of the licensee's misconduct were magnified by its control of the only broadcast facilities in Stamford. Indeed, as the Broadcast Bureau has stated, although in a different context, there was a serious breach of the licensee's public trust.

61. The censorship and discriminatory violations were committed by the general manager of the stations. The logging violations and the sponsorship listing violations are also chargeable to him in that

he failed to exercise adequate supervision over the areas of operation to which they related. However, ultimate responsibility for the censorship and unequal treatment of candidates must be laid at the door of the president and controlling stockholder of the licensee who, as the chief executive officer in turn failed to exercise adequate control over the activities of the general manager and ignored danger signals which should have caused him to inquire into the manner in which political candidates were being handled by the general manager.

62. Countervailing considerations point to the conclusion that the licensee should be permitted to continue with its stewardship of the WSTC stations. Whereas the violations have been found with regard to a particular facet of the station's programming, the overall programming of the stations has been shown to be meritorious, according to a study of the 1969 and 1970 composite weeks' fare. WSTC maintains an outstanding news service with much attention to local news, and it has rendered superior service in its public affairs programming. The WSTC stations have each been serving Stamford under the licensee's ownership for about a quarter of a century and, judging from the notable records of programming for the 1969 and 1970 composite weeks, they have served the community very well.

63. Further, it has not been established that the preferential treatment accorded the successful Republican candidate for mayor resulted from any plan or intention to favor this candidate. Indeed, there is not a scintilla of evidence that the actions of the station's general manager during the 1969 election campaign were politically motivated. Nor does it appear that any political considerations entered into the conduct of the president of the licensee with respect to the treatment of the mayoral candidates. The censorship which did occur resulted from a desire to have the political broadcasts conform with the standards of "good taste" as conceived by the station's general manager.

64. Moreover, with the exception of one instance in which the president of WSTC indulged in inexcusable exaggeration, there was no intentional misrepresentation or lack of candor manifested by either the general manager or the president of WSTC in responding to Commission inquiries. Mr. Kingsley Gillespie, the licensee's president, did not participate in the 1969 election campaign violations and was not aware that Julius Schwartz was requiring deletions from candidates' political scripts over their objections. Gillespie did not know that it was illegal to require submission of political scripts for review in advance of broadcast.

65. As the Commission indicated in *Continental Broadcasting, Inc.*, 15 F.C.C. 2d 113, 131 (1968), a licensee's promises for the future have some bearing although it must be judged even more on the basis of its past. Accordingly, being taken into account with reference to the question of revocation are the extensive corrective measures taken by the licensee. The former general manager of the stations who served in that capacity from about 1947, has been retired from his post. In recent elections there has been no censorship of any kind by the WSTC stations. The president of the stations has taken a considerably more active role in overseeing their operations. Communications counsel have been engaged to advise in the running of the stations. The new general manager, who testified at the hearing,

has instituted procedures to forestall any repetition of the logging and listing violations. A recurrence of the violations which led to this hearing is most unlikely, particularly under the leadership of a much younger general manager.

66. While recognizing there were flagrant violations of the censorship prohibition of Section 315(a), some instances of unequal treatment of candidates, and numerous violations of logging and listing requirements, the considerations discussed above have tilted the determination on the revocation question in the licensee's favor. It is concluded that the licensee is qualified to continue the operation of the WSTC stations. *Continental Broadcasting, Inc., supra*, relied upon by the Bureau, does not require a different result. There, gross and wilful fraud on the Commission was committed, and meritorious programming in mitigation was not shown.

67. At the same time, the Section 315 violations cannot be lightly dismissed. While their effect upon the 1969 mayoral election cannot be assessed, they were an intolerable departure from the standards of conduct in the area of political broadcasting laid down by the Communications Act and the Commission's regulations. Political censorship and unequal treatment of political candidates, no matter what the reasons, "subvert the democratic process" and merit the most severe censure. Moreover, as the Commission held in the *Continental case*, "a licensee must be held responsible for the gross misconduct of the station manager where it has been clearly established that the licensee failed to exercise adequate control and supervision over the station consistent with its licensee responsibilities." That ruling applies to the circumstances of the present case in which the president and controlling stockholder was derelict in meeting his and the licensee's responsibilities of control. For the wilful and repeated serious violations which are reflected by the findings, a forfeiture penalty of not less than the maximum sum is warranted.

In view of the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the above-captioned Order To Show Cause IS DISCHARGED.

IT IS FURTHER ORDERED, That Western Broadcasting Company, licensee of Standard Broadcast Station WSTC and FM Broadcast Station WSTC–FM, Stamford, Connecticut, SHALL FORFEIT the sum of ten thousand dollars ($10,000), the forfeiture to be paid within 30 days after this Initial Decision becomes final, by mailing to the Commission a check, or similar instrument, in the amount of ten thousand dollars ($10,000), drawn payable to the Treasurer of the United States.

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Hearing Examiner.*

F.C.C. 73R-348

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC. 20554

In Re Applications of WGOE, INC. For Renewal of License of WGOE, Richmond, Va. CREST BROADCASTING CORP. For Renewal of License of WEYE, Sanford, N.C.	Docket No. 19757 File No. BR-3631 Docket No. 19758 File No. BR-2739

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1973; Released October 12, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the application of WGOE, Inc. (WGOE) for renewal of its license for standard broadcast Station WGOE, Richmond, Virginia and the application of Crest Broadcasting Corporation (Crest) for renewal of its license for standard broadcast Station WEYE, Sanford, North Carolina.[1] The applications were designated for hearing on various issues by Commission Order and Notice of Apparent Liability, FCC 73-593, released June 5, 1973.[2] Now before the Review Board is a petition to enlarge issues, filed August 6, 1973, by the Broadcast Bureau,[3] requesting the addition of the following issues:

(1) To determine whether WGOE, Inc. has violated the Commission's Rules, as alleged in the Official Notice of Violation issued on December 12, 1972, and, if so, the nature and extent of those violations and, in light of the evidence adduced pursuant to that determination, whether WGOE, Inc. has exercised that degree of responsibility required of a licensee of a broadcast station.

(2) To determine whether Crest Broadcasting Corporation has violated the Commission's Rules, as alleged in the Official Notice of Violation issued on February 29, 1972, and the Official Notice of Violation issued on March 2, 1973, and, if so, the nature and extent of those violations and, in light of the evidence adduced pursuant to that determination, whether Crest Broadcasting Corporation has exercised that degree of responsibility required of a licensee of a broadcast station.

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[1] The above-captioned applications were consolidated in this proceeding because the principals of Crest also owned the majority stock interest in Dixie Broadcasting Corporation (Dixie), the licensee of Station WGOE prior to March 23, 1972. On that date, consent to the assignment of license of WGOE from Dixie to WGOE was granted and the assignment was consummated effective April 18, 1972.

[2] The Commission specified, *inter alia*, the following issue:

To determine whether WGOE, Inc. has violated the Commission's Rules, as alleged in Items 2, 3, 5, 6, 8 and 9 of the Official Notice of Violation issued on June 27, 1972, and, if so, the nature and extent of those violations and, in light of the evidence adduced pursuant to that determination, whether WGOE, Inc. has exercised that degree of responsibility required of a licensee of a broadcast station.

The cited Official Notice alleges violations of Rules 73.52(a), 73.92(b), 73.65, 17.50, 73.40, and 73.39.

[3] Also before the Board are the following related pleadings: (a) opposition, filed August 14, 1973, by Crest; (b) Broadcast Bureau's reply, filed August 22, 1973; and (c) opposition, filed September 13, 1973, by WGOE.

2. In support of its request as to WGOE, the Bureau relies on an Official Notice of Violation, issued by the Commission on December 12, 1972, enumerating violations of Sections 73.52(a), 73.40(a)(8), 73.67(a)(4), and 73.60(a) of the Commission's Rules.[4] The Bureau contends that these violations are identical to the violations which the Commission previously designated for hearing in this proceeding (see note 2, *supra*) and, therefore, that the requested issue is directly concerned with developing a full record of WGOE's apparent continuing violation of the Commission's Rules. With regard to the WEYE violations, the Bureau submits two Official Notices of Violation, issued February 29, 1972 and March 2, 1972, respectively,[5] detailing numerous rule violations.[6] The Bureau concedes that the February 29, 1972 Notice was not submitted in a timely manner, but argues that the matters reflected in that Notice are relevant to show that WEYE's violations as reflected in the March Notice (which it contends was presented in a timely fashion) are not isolated but rather represent a pattern of violations of the Commission's Rules. The Bureau cites *Friendly Broadcasting Company*, 34 FCC 2d 947, 24 RR 2d 314 (1972), to support its request.

3. In opposition, WGOE does not dispute the allegations that the violations took place but asserts that the violations pertain in the main to technical equipment problems which it has tried to correct since July of 1972. Crest, in its opposition, argues that the Bureau's petition is untimely and that no good cause has been shown for the late-filing. As to the March Notice, Crest contends that even assuming, *arguendo*, that it was timely presented, it nevertheless does not satisfy the *Edgefield-Saluda* test[7] by raising serious public interest questions.[8] Crest also asserts that *Friendly Broadcasting Company*, *supra*, is inapposite because the designation Order in that case specified issues relating to alleged technical violations at the station in question, whereas in the instant case, the designation Order does not specify any issue going to prior technical violations by Crest.

4. Although the Bureau's petition is late-filed, the Board believes that it raises substantial public interest questions which require us to consider its merits. *The Edgefield-Saluda Radio Co.*, *supra*. Specifically as to WGOE, the Notice of Violation issued December 12, 1972, concerns violations similar to those already specified against WGOE in this proceeding (see note 2, *supra*) and therefore, we believe, are relevant to the determination required herein concerning the qualifications of WGOE. The Board has frequently found an applicant's past record of station maintenance and supervision to be clearly relevant to a public interest determination in subsequent licensing proceedings.

[4] The Bureau asserts that the WGOE Notice was received by the Bureau's Complaints and Compliance Division from the Field Office in Richmond on June 26, 1973.

[5] The February 29, 1972 Notice to WEYE was received by the Bureau's Complaints and Compliance Division from the Field Office on October 13, 1972 and the March 2, 1973 Notice was first received on June 28, 1973.

[6] WEYE's derelictions also involve technical and operational matters. The February 29, 1972 Notice details noncompliance with Sections 73.93(c), 73.93(e), 73.961(c), 73.87 and 73.46(a) of the Rules and the March 2, 1973 Notice pertains to violations of Sections 73.87 and 73.111(a) of the Rules.

[7] The *Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966).

[8] In this regard, Crest attempts to distinguish *United Television Company, Inc.*, 23 FCC 2d 493, 19 RR 2d 86 (1970), where a Notice covering some nineteen violations was added upon a late filing as to an applicant which had previously been fined $7,500 for similar technical violations.

See, *e.g.*, *Friendly Broadcasting Company*, *supra*; *Louis Vander Plate*, 26 FCC 2d 874, 20 RR 2d 798 (1970); *United Television Company, Inc.*, 23 FCC 2d 493, 19 RR 2d 86 (1970). With regard to Crest, the Board is of the view that the violations alleged in the February and March Notices are sufficient to warrant an evidentiary inquiry. Concededly, the Bureau's allegations based on the February Notice are untimely;[9] however, the hearing will not be disrupted[10] by the grant of the request and the allegations of violations have not been rebutted.[11] Finally, the violations contained in the March Notice must be viewed along with those contained in the earlier Notice to determine whether considered together they demonstrate a pattern of recurring violations of the same nature. *Stephen Van Sadler*, 30 FCC 2d 850, 22 RR 2d 510 (1971).

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed August 6, 1973, by the Broadcast Bureau IS GRANTED; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

(a) To determine whether WGOE, Inc. has violated the Commission's Rules, as alleged in the Official Notice of Violation issued on December 12, 1972, and, if so, the nature and extent of those violations.

(b) To determine whether Crest Broadcasting Corporation has violated the Commission's Rules, as alleged in the Official Notice of Violation issued on February 29, 1972, and the Official Notice of Violation issued on March 2, 1973, and, if so, the nature and extent of those violations.

(c) To determine whether, in light of the evidence adduced under the preceding issues, WGOE, Inc. and Crest Broadcasting Corporation have exercised that degree of responsibility required of Commission licensees.

7. IT IS FURTHER ORDERED, That the burdens of proceeding and proof as to the added issues SHALL BE as set forth in paragraph 8 of the Order and Notice herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[9] See *George E. Worstell*, 33 FCC 2d 1153, 23 RR 2d 1234 (1972), where the Board found an issue was warranted, even though good cause was not established and the petition was allegedly filed *20* months late.

[10] The hearing is scheduled to commence on November 5, 1973. Order of the Administrative Law Judge, FCC 73M–810, released July 10, 1973.

[11] The Board notes that the violations specified in the February Notice occurred when Crest principals were in control of Dixie, former licensee of WGOE. See note 1, *supra*.

F.C.C. 73R-365

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WLCY-TV, INC. (WLCY-TV), LARGO, FLA. For Construction Permit	Docket No. 19627 File No. BPCT-4484

MEMORANDUM OPINION AND ORDER

(Adopted October 25, 1973; Released October 26, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board is a petition for enlargement of issues, filed August 3, 1973, by Sarasota-Bradenton Florida Television Company (WXLT), requesting the addition of the following issue:[1]

To determine whether WLCY-TV has a reasonable expectancy of obtaining permission from the State of Florida to construct its proposed tower at the site specified in its application.

Also before the Board is a motion for leave to file supplement and supplement to opposition to petition to enlarge issues, filed October 9, 1973, by WLCY.[2]

2. WXLT argues that the addition of a site availability issue against WLCY is warranted in light of the actions taken by the Florida State Department of Transportation (Department). The factual basis for the request is not in dispute. On September 28, 1973, the Chief of the Bureau of Aviation in the Department's Division of Mass Transit Operations denied WLCY's request for a construction permit after concluding that a tower of the proposed height (1,549 feet) in the planned location would be a hazard to air navigation and would result in an inefficient utilization of airspace.[3] Under the Department's rules, an applicant whose permit request is denied is entitled to a hearing; accordingly, a hearing on WLCY's application has been scheduled for October 30, 1973. Though this hearing could result in a decision to grant a permit, WXLT contends that the initial denial of WLCY's request casts reasonable doubt on its ability to obtain the approval of local officials. While conceding that its petition is not timely, WXLT argues that the Department's regulations, which were promulgated on November 23, 1972, did not come to the attention of any of the attorneys involved in these proceedings until shortly before

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's comments, filed September 6, 1973; (b) opposition, filed September 10, 1973; and (c) reply, filed October 5, 1973, by WXLT.

[2] WLCY's motion for leave to file supplement will be granted; the supplement responds to circumstances which took place after the filing of the petition and original opposition, and which were raised for the first time in WXLT's reply.

[3] WXLT also notes that the Florida State Department of Transportation twice filed petitions with the Federal Aviation Administration in opposition to WLCY's request for a determination of no hazard to air navigation. The FAA issued a no-hazard determination on September 2, 1971, and affirmed its decision on December 3, 1971.

July 18, 1973, and that, in any event, the serious public interest questions raised by the allegations merit consideration by the Board.

3. In a supplement to its opposition, WLCY asserts that the FAA's favorable determination concerning its proposed tower is binding upon the Florida Department of Transportation. Nevertheless, WLCY states, it intends to exhaust its administrative remedies before the Department, and in the event that the Department's initial ruling is not overturned, it will seek a judicial determination declaring that, because of federal preemption, the Department lacks jurisdiction to declare a tower an air hazard when it has been previously approved by the FAA. In view of the unusual posture of this case, WLCY argues, it would be appropriate to dismiss the instant petition subject to refiling or to hold the petition in abeyance pending ultimate resolution of this matter by the Florida authorities.

4. Although WXLT's request is untimely, the Board is of the view that substantial doubt has been raised as to whether WLCY has a reasonable expectancy of obtaining permission from the appropriate local authorities to construct its proposed tower at the site specified in its application. The Commission and Review Board have long held that while an applicant must have reasonable assurance of obtaining local zoning or licensing authorization for its antenna proposal, there is an assumption that such approval will be forthcoming.[4] However, this assumption may be effectively rebutted by a reasonable showing that the necessary authorization cannot be obtained. In our view, the adverse determination of the Florida State Department of Transportation constitutes such a showing. Despite the fact that WLCY intends to exhaust its administrative and judicial remedies, the issuance of an initial adverse determination is sufficient to rebut the assumption that approval can reasonably be anticipated and raises a substantial question in this regard.[5] See *El Camino Broadcasting Co.*, 14 FCC 2d 361, 13 RR 2d 1260 (1968) and *Salem Broadcasting Co.*, 40 FCC 2d 458, 26 RR 2d 1565 (1973). Under these circumstances, petitioner has met the *Edgefield-Saluda* test[6] and a site availability issue will be added.[7]

5. Accordingly, IT IS ORDERED, That the motion for leave to file supplement, filed October 9, 1973, by WLCY–TV, Inc., IS GRANTED; and

6. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed August 3, 1973, by Sarasota-Bradenton Florida Television Company IS GRANTED; and

7. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

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[4] *El Camino Broadcasting Co., Inc.*, 12 FCC 2d 329, 12 RR 2d 1057 (1968).

[5] WLCY's contention that the determination of no hazard by the FAA renders state action a nullity is conjectural at this time, and, as a consequence, cannot be regarded as an indication of WLCY's likelihood of success upon appeal.

[6] 5 FCC 2d 148, 8 RR 2d 611 (1966).

[7] The Board is of the view that the position urged by WLCY in its supplemental pleading, *i.e.* that the Board dismiss the petition or hold it in abeyance until the matter is resolved, would be contrary to the orderly and efficient disposition of the Commission's business; thus, if the procedure suggested by WLCY were adopted, an applicant would have the power to delay resolution of cases almost indefinitely. The Board notes, however, that the Presiding Judge has ample authority to ensure that WLCY receives a reasonable opportunity to meet the issue being specified herein.

To determine whether WLCY–TV, Inc. has a reasonable expectancy of obtaining permission from the State of Florida to construct its proposed tower at the site specified in its application.

8. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence and the burden of proof under the issue added herein shall be on WLCY–TV, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*